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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MALCOLM PIRNIE, INC.,
Petitioner,

v.

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an employer who in good faith attempts to pay its employees who are otherwise exempt from the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, on a salary basis may use the window of correction found in 29 C.F.R. § 514.118(a)(6) to ameliorate an error in its pay practices by reimbursing employees for any underpayment arising from deductions for absences of less than a day and clarifying or correcting its pay practices so as to avoid having all of the otherwise exempt employees deemed nonexempt and thereby entitled to overtime pay.

PARTIES BELOW AND PARENT COMPANIES

The names of the parties below are identified in the Petition. Malcolm Pirnie, Inc. is a closely-held corporation with no subsidiaries or affiliates and no public stock has been issued.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Malcolm Pirnie, Inc. ("Malcolm Pirnie") respectfully requests that this Court grant the Petition for a Writ of Certiorari seeking review of the decision and judgment of the United States Court of Appeals for the Second Circuit. As discussed below, a review of the issues presented in this case is necessary to resolve a conflict among the circuits on the issue of whether an employer who, in good faith, attempts to pay its employees who are otherwise exempt from the Fair Labor Standards Act ("FLSA" or "the Act") 29 U.S.C. § 201 *et seq.* on a

salary basis may use the window of correction to ameliorate an error in its pay practices.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit is published at 949 F.2d 611 and is set forth in the Appendix to the Petition ("Pet. App.") A at 1a. The opinion of the United States District Court for the Southern District of New York is published at 758 F. Supp. 899 and is set forth in Pet. App. B at 12a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 20, 1991. Pet. App. A. A petition for rehearing was denied by order of that court dated February 7, 1992. Pet. App. C at 31a. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTE(S) AND REGULATION(S) INVOLVED

The statutory and regulatory provisions involved in this case are:

29 U.S.C. § 213 [1]

29 C.F.R. § 541.118.[2]

STATEMENT OF THE CASE

Petitioner seeks review of a decision and judgment of the United States Court of Appeals for the Second Circuit that reversed a district court decision granting summary judgment for Malcolm Pirnie and dismissing with prejudice DOL's complaint for back overtime pay for most of Petitioner's exempt employees. The basis for

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[1] The text of this provision is set forth in Pet. App. D at 32a.

[2] The text of this provision is set forth in Pet. App. E at 46a.

federal jurisdiction in the district court is 29 U.S.C. § 217.

A. Factual Background

Petitioner Malcolm Pirnie is a consulting engineering firm with more than 900 employees nationwide. The majority of the firm's work involves government contracts. The employees in question are considered by Malcolm Pirnie to be exempt from the FLSA and are in grade levels 6 through 9 of Malcolm Pirnie's eleven salary grades. Some 376 employees were in grades 6 through 9 positions during the period in question. The jobs represented include positions such as engineers, architects, scientists, supervisors, accountants, and administrators.[3] The employees are well-compensated, earning salaries from over $30,000 to $70,000 per year. Employees are paid a fixed amount on a bi-weekly basis. In addition, Malcolm Pirnie compensated employees in grades 6 through 8 on a time-and-a-quarter basis for all hours worked in excess of 40 hours in a workweek, irrespective of their exempt status. Likewise, it paid grade 9 employees additional straight time for all hours worked in excess of 40 in a workweek. Malcolm Pirnie is required to account for its employees' time charged, directly or indirectly, to federal, state and local government clients. Accordingly, all Malcolm Pirnie employees are required to account for all of their time and for at least eight hours per workday.

Until December 8, 1988, Malcolm Pirnie's employment handbook stated that an employee who missed a fraction of a workday would have such absences treated as leave without pay, if the time was not made up or charged to a paid leave account. The handbook did not state whether or not that provision was applicable to exempt employees. In fact, Petitioner has maintained that the provision was

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[3] DOL did not contest that these employees meet the duties portion of the FLSA exemption test.

not intended to apply to them. Petitioner never directed an exempt employee to record an absence of less than a day as leave without pay. However, 24 exempt employees in grades 6 through 9 entered "absence without pay" on their time sheets for absences of less than a day. Their paychecks were then issued in accordance with their entries.

Malcolm Pirnie, utilizing the window of correction in the salary basis test, 29 C.F.R. § 541.118(a)(6) (1991), determined that 24 exempt employees in grades 6 through 9 had had deductions in their salaries for fractions of days missed totalling $3,269.78. It reimbursed these employees, and former employees, for all salary deductions that had been made. Petitioner also, on December 8, 1988, clarified its policy regarding absences for less than a day to expressly state that exempt employees would not incur a reduction in salary if they worked less than eight hours in a day. Petitioner also made clear that exempt employees could charge part-day absences to an "overhead" account rather than to their personal leave accounts.

B. Procedural Background

On May 19, 1989, the Secretary of the U.S. Department of Labor ("the Secretary" or "DOL") commenced a lawsuit against Malcolm Pirnie alleging that employees in Malcolm Pirnie's pay grades 6 through 9, during the period of May 1, 1987 through December 8, 1988, were not exempt from the overtime provisions of the FLSA and were therefore entitled to additional overtime pay. On June 12, 1989, Malcolm Pirnie filed an Answer denying that it had violated the overtime provisions of the FLSA and asserting that the employees in question were exempt executive, administrative or professional employees pursuant to 29 U.S.C. § 213 and the applicable regulations found at 29 C.F.R. § 541.

On June 27, 1990, after the close of discovery, Malcolm Pirnie filed a Motion for Partial Summary Judgment asserting that summary judgment was proper on

the issue of whether the employees in grades 6 through 9 had been compensated on a salary basis. The Secretary filed a Cross Motion for Partial Summary Judgment on September 28, 1990. The one issue excluded from the motions was whether 43 particular employees met the duties test for exemption under the Act. On or about October 18, 1990, Malcolm Pirnie was informed that the Secretary would withdraw its complaint insofar as it challenged the exemptions of the 43 particular employees on the grounds that they did not meet the duties test, thereby leaving only the question of whether employees in grades 6 through 9 for the period of May 1, 1987 through December 8, 1988 were compensated on a salary basis.

On March 4, 1991, the District Court for the Southern District of New York granted Malcolm Pirnie's summary judgment motion on the condition that Malcolm Pirnie promptly submit a revised affirmation of its promise to comply with 29 C.F.R. § 541.118(a), which condition was met. On April 1, 1991, Judge Goettel entered a final judgment dismissing the action with prejudice. The district court found that Malcolm Pirnie had properly utilized the window of correction to correct any improper salary deductions and that DOL's view that the window of correction is only available if the employer's pay practices already met every proviso of the salary basis regulation (§ 541.118(a)(1) to (5)) is "too rigid." *Dole v. Malcolm Pirnie, Inc.*, 758 F. Supp. 899, 904 (S.D.N.Y.), *rev'd sub nom., Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991).

On November 20, 1991, a panel of the United States Court of Appeals for the Second Circuit reversed and remanded the judgment of the district court, finding that Malcolm Pirnie had a policy of docking pay of its exempt (grades 6 through 9) employees and, for that reason, could not invoke the window of correction.

The Second Circuit relied upon the language in Malcolm Pirnie's Policy Guide, and in its Handbook of Information for Staff, and an affidvait of a DOL investigator (who was never examined as a witness) in finding that:

> [Malcolm Pirnie] maintained a policy of docking pay to grade 6 through 9 employees for fractions of the workday they missed. Thus, [Malcolm Pirnie] was not entitled to invoke the "window of correction" with regard to these employees and, as a result, they may not be considered to have been paid on a salary basis.

Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 617 (2d Cir. 1991).

The Second Circuit opinion did not mention Judge Goettel's statement in the district court opinion that:

> The record suggests that, corporate literature notwithstanding, the intended and actual policy of [Malcolm Pirnie] with respect to the employees in grades 6 through 9 was to not dock them for absences of less than a day.

Dole v. Malcolm Pirnie, Inc., 758 F. Supp. at 908. The Second Circuit relied upon the fact that the Malcolm Pirnie handbook and guide did not expressly mention that the statement applied only to nonexempt employees. *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d at 616.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Petitioner Malcolm Pirnie respectfully requests that the Court grant its petition for a writ of certiorari to resolve a conflict among the circuits regarding an employer's right to use the window of correction portion of the regulation covering the salary basis aspect of the requirements for exemption from the FLSA. The Court should grant the petition herein to ensure consistency in the application of the FLSA, which affects virtually all employers in the United States. If the Second Circuit decision is permitted to stand, the result would be that employers will be liable for a potentially enormous windfall payment of overtime pay to *all* of their otherwise exempt employees. The amount at risk for American industry, if the Second Circuit decision is permitted to stand, is estimated to be in the tens of billions of dollars.[4] And, as more fully discussed below, employers would be unable to correct even de minimis deductions without incurring catastrophic liability. This, in turn, would result in a severe disincentive for employers to reimburse their exempt employees for any inappropriate deductions. Such a disincentive would be contrary to the purposes of the FLSA and DOL's regulations and policies.

The Second Circuit's interpretation of the salary basis regulation is also contrary to the plain meaning of the regulation. The Court should grant this Petition for Certiorari in order to determine how the lower courts should properly construe the regulation.

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[4] In this connection, we note that Governor Pete Wilson stated that the backpay owing to California *public* employees alone resulting from the similar interpretation of the salary basis test in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 785 (1991), was three billion dollars. *See* Pet. App. G. at 59a.

I. THE COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS REGARDING THE CORRECT USE OF THE WINDOW OF CORRECTION FOUND IN THE SALARY BASIS TEST REGULATION

A. The Second Circuit, Contrary To The Fourth Circuit, Imposes A Requirement That All The Elements Of The Salary Basis Test Must Be Met Strictly Before The Window Of Correction Can Be Utilized

Petitioner's Writ of Certiorari should be granted to enable the Court to resolve a conflict among the circuits on the issue of when an employer can properly utilize the window of correction section of the salary basis regulation.

In order to be exempt from the overtime pay provisions of the FLSA, the employee must meet both a duties test and be paid on a salary basis. 29 C.F.R. § 541.118. The salary basis regulation states in pertinent part:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

29 C.F.R. § 541.118(a).

The salary basis regulation permits the retention of an employee's exempt status even though certain deductions have occurred. The effect of an impermissible deduction upon that exempt status is to be determined based

upon the facts in each particular case. 29 C.F.R. § 541.118(a)(6). The regulation, commonly known as the "window of correction," further states:

> [W]here a deduction not permitted by these interpretations is inadvertent, *or* is made for reasons other than lack of work, *the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.*

Id. (emphasis added).

Malcolm Pirnie, upon discovering that its policies may not have been consistent on their face with the salary basis regulation (1) revised and clarified its policy; (2) investigated whether any exempt employees had had their pay reduced; (3) restored to all exempt employees any pay which had been deducted for partial day absences; and (4) promised to comply with the salary basis test in the future.[5] Malcolm Pirnie followed the window of correction to the letter. The district court found that the window of correction expressly allowed for remediation and that Malcolm Pirnie had properly utilized the window of correction. *Dole v. Malcolm Pirnie, Inc.*, 758 F. Supp. at 904-08. The district court in so finding stated that Malcolm Pirnie could use the " 'window of correction' . . . to retroactively restore exempt status to [grade 6 through 9] employees who . . . had their pay subjected to reduction for absences of less than a day." *Id.* at 904.

The Second Circuit found, however, that "because [Malcolm Pirnie] subjected grade 6 through 9 employees to pay deductions on the basis of part-day absences, . . . [the] employees may not be considered salaried." *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d at 615, and that Malcolm

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[5] In total, 24 employees had been subject to cash deductions representing approximately 100 hours of work totalling less than $3,300. Over one million hours were worked by the exempt employees in the relevant time period.

Pirnie, therefore, had not proven that the window of correction was available to it. *Id.* at 616-17.[6]

The Second Circuit's view that the salary basis test must be met before an employer can utilize the window of correction is contrary to the view of the Fourth Circuit.[7] In *Hartman v. Arlington County, Va.*, 903 F.2d 290 (4th Cir. 1990), the Fourth Circuit affirmed on the reasoning of the lower court, the grant of summary judgment for the county finding that fire shift commanders are exempt employees. *Id.* at 291-92.

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[6] The Second Circuit also stated that most courts that have addressed the issue of whether employees are paid on a salary basis:

> have agreed that if an employer has a policy of reducing an employee's compensation for fractions of days that the employee is absent from work, then the employer may not invoke the "bona fide executive" exemption with regard to that employee.

Martin v. Malcolm Pirnie, Inc., 949 F.2d at 615. In none of the cases cited by the court did the employer attempt to properly utilize the window of correction. It is worth noting that there is also a split among the circuits as to whether being merely subject to "theoretical" deductions, as opposed to actual deductions, is sufficient to violate the salary basis test. *See Abshire v. County of Kern*, 908 F.2d at 487-89 (if pay is subject to reduction, salary basis test is violated even if no actual deductions are made). *But see Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991) (pay is not "subject to reduction" because there is no evidence that any captain had actually suffered a reduction in pay).

[7] The Ninth Circuit in dictum also appears to agree with the Second Circuit. In *Abshire v. County of Kern*, 908 F.2d at 489, the court said, in dictum, that subsection 6 (the window of correction) is only available for an employer that makes a *one-time* improper deduction and corrects the error. *See also Knecht v. City of Redwood City*, 683 F. Supp. 1307 (N.D. Cal. 1987); *Dole v. Walker and Armstrong*, 763 F. Supp. 1052, 1054 (D. Ariz. 1990). In *Abshire* and the district court cases, however, the employer did not take the corrective action which is a prerequisite for the use of the window of correction; accordingly, all three cases (*Abshire, Knecht*, and *Walker and Armstrong*) are distinguishable from Malcolm Pirnie's facts.

The district court opinion more fully discussed the availability of the window of correction to the county. *Hartman v. Arlington County, Va.*, 720 F. Supp. 1227, 1229-30 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990). The plaintiffs in that case had argued that they were not salaried because the county had "a policy that if an employee exhausts his leave and works a partial shift, he is paid only for the actual hours worked." *Id.* at 1229. The previous policy was changed and under the new policy "salaried county employees are not subject to a deduction for absences of less than one work day." *Id.* The court found that while the county "may or may not have complied with the FLSA on this point in the past, [the] County clearly is in compliance now." *Id.* Further, the court found:

> Under § 541.118(a)(6), any inadvertent deductions will not result in the loss of the exemption if the employer reimburses the employee and promises to comply in the future. By revising its policy, the County has demonstrated its compliance with the regulation and its intent to comply in the future. Between April 1986 and the time of the revision, the County had inadvertently deducted salary from seven exempt employees for absences of less than one full day. The County has since reimbursed the employees for these deductions . . . .

Id. at 1229-30. *See also International Ass'n of Firefighters, Alexandria Local 2141 v. City of Alexandria, Va.*, 720 F. Supp. 1230, 1232 (E.D. Va. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990); *Sarver v. City of Roanoke, Va.*, 29 Wage & Hour Cas. (BNA) 1442, 1444 (W.D. Va. 1989) (any perceived violation of the FLSA with respect to salary basis test was inadvertent and was remedied by use of the window of correction and does not result in loss of exemption for fire captains); *Chadwick v. Norfolk*, 29 Wage & Hour Cas. (BNA) 1407, 1408 (E.D. Va. 1988) (fire captains and lieutenants are salaried even though city had policy of making deductions for absences of less than a day where policy was cor-

rected in good faith compliance with regulation allowing for correction); *Harkins v. City of Chesapeake*, 29 Wage & Hour Cas. (BNA) 1399, 1400-03 (E.D. Va. 1988) (fire captains and lieutenants are paid on a salary basis even though the city had a policy of deducting on a per hour basis for time missed of less than a day when losses could not be covered by vacation or sick leave, where city reimbursed those who suffered deductions and promised to comply in the future); *Keller v. City of Columbus, Ind.*, 778 F. Supp. 1480, 1487 (S.D. Ind. 1991) (salary was subject to deduction but this was cured by using the window of correction and changing policy);[8] *Martin v. Pierce Processing, Inc.*, No. C-1-89-15, slip op. at 9 (S.D. Ohio Mar. 25, 1992) (employer intended to pay employees on a "salary basis," promised to comply with the Act in the future and offered to reimburse all employees for deductions made).[9]

The Fourth Circuit, and its district courts, clearly permit an employer to utilize the window of correction without first meeting the salary basis test. Malcolm Pirnie believes that this is the correct interpretation of the salary basis regulation and that, indeed, the plain wording of the regulation supports such a reading. The Second Circuit, however, is in conflict with the Fourth Circuit, having held in the present case that an employer must first meet all the specifics of the salary basis test before the employer is entitled to use the window of correction. Malcolm Pirnie believes that the Second Circuit's interpretation is incorrect because it results in effectively reading out of the regulation the window of correction. Under the Second Circuit's interpretation, an employer

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[8] The Court will note that much of the litigation in this area to date has involved public employers. The requirements of the salary basis test, 29 C.F.R. § 541.118, apply to both public and private employers; the regulations make no distinction.

[9] The slip opinion of this case is included in the appendix as Pet. App. F at 51a.

who discovers a mistake in his pay practices (other than a single clerical error) cannot use the window of correction and preserve the exempt status of his employees. Such a result would be unjust as well as unreasonable. The court should grant this Petition for Certiorari in order to resolve this split among the circuit courts.

B. The Second Circuit's Interpretation Of The Window Of Correction Is Contrary To The Language Of The Regulation And If Permitted To Stand Will Result In A Windfall In Overtime Pay To Otherwise Exempt Employees and Economic Hardship To Employers

The applicable regulation does not require that employers, before utilizing the window of correction, first compensate employees on a salary basis which meets all the particulars of the salary basis test. In the regulation, "salary basis" is defined in 29 C.F.R. § 541.118(a) and its subsections 1 to 6. The window of correction is contained in § 541.118(a)(6). Nowhere in that subsection or elsewhere in the regulation is it suggested that an employer's pay practices must meet all of the requirements of the salary basis test before availing itself of the window of correction. The window of correction is, in fact, part of the definition of "salary basis". Thus, the Second Circuit's interpretation is unreasonable since the plain language of the regulation explicitly permits employers who make improper deductions, inadvertently or for reasons other than lack of work, to correct their mistakes and still be in compliance with the salary basis test.

Under the Second Circuit's interpretation, the window of correction would effectively be eviscerated from the salary basis regulation, since virtually no employer who would seek and need to use the section's remediation provision could demonstrate that it had already compensated employees in accordance with all of the requirements of the salary basis test. And, if an employer was paying in accordance with the salary test it would have no need

to use the window of correction. Thus, the window of correction would not be available to the very employers who need it. By reading the availability of the window of correction as narrowly as it did, the Second Circuit has rendered the window of correction essentially useless to accomplish the primary purposes for which Petitioner submits the regulation was intended.

Furthermore, the regulation expressly states that in order for an employer to utilize the window of correction, the impermissible deduction must have been "inadvertent *or* . . . made for reasons other than lack of work." 29 C.F.R. § 541.118(a)(6) (emphasis added). *See also Brown v. Eckerd Drugs, Inc.*, 24 Wage & Hour Cas. (BNA) 114 (M.D.N.C. 1979) (employees suffered deductions in pay because of lack of work). Any impermissible deductions made by Malcolm Pirnie were for reasons other than lack of work. A proper reading of the regulation requires that meaning be afforded to the disjunctive phrase "inadvertent, or is made for reasons other than lack of work" found in the regulations. *Id.* at 115 (quoting 29 C.F.R. § 541.118(a)(6)). It is a hornbook rule of construction that every word in a regulation is deemed to have a meaning. *See Suwannee River Finance, Inc. v. United States*, 7 Cl. Ct. 556, 560 (1985). *See also Allen Oil Co. v. C.I.R.*, 614 F.2d 336 (2d Cir. 1980); C.J.S. Public Administrative Law & Procedure § 94 (1983) (generally the rules and regulations of a public administrative agency are subject to the same principles of construction applicable to the construction of statutes). The regulation plainly allows the use of the window of correction for reasons other than "inadvertence," otherwise the regulation would not use the term "or." [10]

The court in *Keller v. City of Columbus, Ind.*, discussed this very issue. It concluded that:

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[10] Of coure, the employer must have acted in good faith in order to avail itself of the window of correction. Good faith on the part of the employer in administering its pay practices is clearly a prerequisite implied in the regulation.

> Whether the policy allowing hourly deductions was inadvertent need not be considered. The regulation provides that the "window of correction" option applies when a deduction is inadvertent "*or* is made for reasons other than lack of work." 29 C.F.R. § 541.118(a)(6). Thus, if a policy allowed a deduction "for reasons other than lack of work" then the "window of correction" is open regardless whether the error was inadvertent. In this case, the policy allowed a deduction for missing work, not because there was a lack of work. The tangential debate about whether temporal duration of the policy qualified as "inadvertent" is unnecessary.

778 F. Supp. at 1487 (emphasis in original). Another recent case, *Martin v. Pierce Processing, Inc.*, No. C-1-89-15 supports this view as well. In that case the court stated:

> Here, it is clear that defendants' deductions were never made because work was lacking, but only when employees were voluntarily absent for personal reasons unrelated to whether work was available. Defendants have offered to reimburse all employees for deductions made. Further, defendant has not only promised to comply with the Act in the future, but is currently in compliance. All other aspects of this case point to a situation where the employer intended to pay his employees on a "salary basis," intended to operate within the letter and spirit of the Act, and sought to treat and pay his employees in a manner that was professional, considerate and equitable.
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> * * * *
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> The Court . . . finds that, subject to the conditions that (1) defendants reimburse their employees for the deductions made, and (2) defendants promise to comply with the Act in the future, the employees in question are, and were, exempt from the overtime payment provision of the Act.

Id., slip op. at 9.

Contrary to the plain language in the regulation, as read and applied by the courts in *Keller* and *Pierce Processing*, the Second Circuit found that Malcolm Pirnie was not entitled to invoke the window of correction because it did not meet the salary basis test in the first place. *Martin v. Malcolm Pirnie*, 949 F.2d at 616. The Second Circuit did not reach the question of whether deductions had been made due to "inadverten[ce] or . . . reasons other than lack of work." [11] 29 C.F.R. § 541.118(a)(6). In so finding, the court failed to follow the plain meaning of the regulation.

The problem with the Second Circuit's failure to interpret the window of correction in light of its plain meaning is the effect of such an interpretation on many employers. The ruling of the Second Circuit, if permitted to stand, will mean that *all* of an erring company's otherwise exempt employees must be paid overtime as if they were hourly employees, for two years prior to the time the corrective action was taken. This ruling will exact a devastating toll on businesses large and small. In this case alone, Malcolm Pirnie would be required to pay approximately two million dollars [12] in overtime compensation to 376 well-compensated otherwise exempt employees such as engineers, scientists and managers. The potential liability to employers in the United

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[11] The district court in *Dole v. Malcolm Pirnie, Inc.*, concluded that the better reading of the regulation is that the improper deductions must have been made *both* for reasons other than lack of work *and* inadvertently. *Dole v. Malcolm Pirnie, Inc.*, 758 F. Supp. at 906-07. The district court found that on the facts of the case, Malcolm Pirnie's deductions were "inadvertent." *Id.* at 908. Malcolm Pirnie urged the Second Circuit to affirm the trial court on the basis that the deductions were made for reasons other than lack of work and that Malcolm Pirnie had acted in good faith.

[12] Since Malcolm Pirnie already paid time-and-a-quarter to most of its exempt employees and straight time to the rest, approximately $500,000 is claimed by the Secretary to be due to Malcolm Pirnie's exempt employees.

States, who may have written policies which can be misconstrued or which contradict their actual practices, is in the tens of billions of dollars, as can be seen from the large amount of overtime wages found to be owing to a small number of exempt employees in the present case.[13]

This result is not because employees were misclassified as exempt in terms of their duties, but rather because a technical portion of the salary basis test was found to have been violated. And when Malcolm Pirnie attempted to correct any violations, pursuant to the window of correction, the Second Circuit found it was not entitled to use that portion of the regulation. If the Second Circuit's interpretation is permitted to stand, then responsible, model employers such as Malcolm Pirnie will be caught in a "catch-22" situation. They will be unable to correct even a de minimis number of improper deductions from salaried compensation—or even to correct a policy that resulted in *no* actual deductions—by any means other than full overtime payments to each salaried exempt employee who was subject to the employer's compensation policy for the entire two year statute of limitations period. And, because of the catastrophic consequences of admitting to and confronting payment mistakes, they will be vulnerable to threats, by even a few individual employees, of a lawsuit which, if successful, could invalidate the exemption for *all* the employer's exempt employees.

By not permitting Malcolm Pirnie to use the window of correction, the Second Circuit has effectively (1) so narrowed the window of correction that it is virtually useless to employers; (2) afforded a significant disincentive to employers who have acted in good faith to take corrective action when they do discover deficiencies in their salary administration system; (3) provided an un-

[13] The cost impact for state and local government employees in the State of California alone is some three billion dollars. *See* note 4; Pet. App. G.

anticipated and unearned windfall to well-compensated, otherwise exempt, employees; and (4) rendered the employers vulnerable to inflated settlements to avoid lawsuits by individual employees which could result in the loss of the exemption for all its employees.

We urge the Court to grant this Petition for Certiorari to both avoid serious injustice and prevent severe economic consequences to companies who have acted in good faith.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Certiorari be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OFAPPEALS
SECOND CIRCUIT

No. 1710, Docket 91-6138

LYNN MARTIN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellant,

v.

MALCOLM PIRNIE, INC.,
Defendant-Appellee.

Argued Nov. 1, 1991

Decided Nov. 20, 1991

Marva M. Peace-Jackson, Washington, D.C. (David S. Fortney, Deputy Sol. of the U.S. Dept. of Labor, Monica Gallagher, Associate Sol., William J. Stone, Counsel for Appellate Litigation, Washington, D.C., Patricia M. Rodenhausen, Regional Sol., New York City, of counsel), for plaintiff-appellant.

Ronald M. Green, New York City (Gilbert J. Ginsburg, Epstein Becker & Green, P.C., Sandra J. Boyd, Gerard P. Cavaluzzi, Malcolm Pirnie, Inc., Robert L. Jauvtis, Bickel & Brewer, of counsel), for defendant-appellee.

Before OAKES, Chief Judge, FEINBERG and ALTIMARI, Circuit Judges.

ALTIMARI, Circuit Judge:

Plaintiff-appellant Lynn Martin, Secretary of the United States Department of Labor ("Secretary"), appeals from a judgment entered in the United States District Court for the Southern District of New York (Gerard L. Goettel, *Judge*), conditionally granting defendant-appellee Malcolm Pirnie, Inc.'s ("MP") motion for partial summary judgment and dismissing the action. The Secretary initiated the underlying action against MP seeking to remedy MP's alleged violation of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. § 201 *et seq.* (1988). Essentially, the Secretary contended below, and now argues on appeal, that MP violated the FLSA by failing to provide adequate compensation to a group of employees for overtime hours they worked. MP, in response, claimed that the employees at issue were "bona fide executive" employees and therefore were not covered by the overtime provisions of the FLSA. *See* 29 U.S.C. § 213(a)(1).

In order to attain "bona fide executive" status, an employee must meet both a salary basis and a duties test. *See* 29 C.F.R. § 541.1 (1990). On cross-motions for partial summary judgment, the parties submitted to the district court the sole issue of whether the employees in question—who are concededly well-paid and perform professional and managerial functions—met the salary basis requirement. Upon reviewing the applicable regulations, the district court concluded that, although these employees were required to work a certain number of hours each week, they were paid on a salary basis. The district court thus granted MP's motion for partial summary judgment. Because the Secretary withdrew its remaining claims, the district court dismissed the action with prejudice. Consequently, the central issue on this appeal is whether these highly compensated employees, who are normally characterized as professionals, are properly considered hourly, rather than salaried, employees if their compensation is

subject to reduction for working less than eight hour days.

For the reasons set forth below, we reverse the judgment of the district court.

BACKGROUND

MP is a corporation that specializes in providing environmental engineering, architectural, scientific and planning services to various industrial clients. MP employs approximately 900 individuals in its twenty-four nation-wide offices.

Once an employee joins MP, he or she is assigned a salary grade between 1 and 11. The basic issue in this case concerns MP's compensation scheme for employees in grades 6 through 9. These employees include engineers, accountants, architects, scientists, supervisors and administrators. By ordinary standards, grade 6 through 9 employees are well-paid professionals. Depending on their positions, they earn between $30,000 and $70,000 each year. Although employees in grades 6 through 9 are paid a fixed amount on a bi-weekly basis, they are required to work at least eight hours a day. MP compensates employees in grades 6 through 8 on a time-and-a-quarter basis for overtime hours worked, while it pays grade 9 employees straight time for overtime hours.

Until December 8, 1988, MP employment manuals provided that an employee in any pay grade who missed a fraction of a work-day would have a pro rata amount deducted from his or her pay, unless he or she made up the lost time or charged it to his or her vacation or sick leave. From May 1, 1987 to December 8, 1988, MP deducted a total of $3,269.78 from twenty-four different grade 6 through 9 employees' salaries for fractions of days that these employees missed and did not make up or charge to accrued leave time. On December 8, 1988, MP changed its policy regarding absences of less than a day. Under MP's new rules, grade 6 through 9 employees could charge

part-day absences to an overhead account rather than to their individual accounts. Moreover, MP ensured that these employees' wages would not be reduced if they worked less than an eight hour day. After initiating this new policy, MP reimbursed the twenty-four employees and former employees for all salary deductions MP had made as a result of their part-day absences.

Shortly after MP made these policy revisions, the Secretary initiated the underlying action in the United States District Court for the Southern District of New York, alleging that MP had violated the FLSA by compensating employees in grades 6 through 9 at less than a rate of time-and-a-half for overtime hours worked. *See* 29 U.S.C. § 207(a)(1) (requiring employers to compensate employees on a time-and-a-half basis for each hour they work in excess of the usual forty hour workweek). Accordingly, the Secretary sought to permanently enjoin MP from violating the overtime pay provisions of the FLSA and from withholding unpaid overtime compensation due MP employees. Additionally, the Secretary sought prejudgment interest on amounts unlawfully withheld, as well as costs.

In its answer, MP claimed that the employees in question were "bona fide executives" and therefore were not covered by the FLSA's overtime pay provision. *See* 29 U.S.C. § 213(a)(1) (exempting, *inter alia*, executives, managers and professionals from overtime pay requirements). In order to be considered a "bona fide executive," an employee must be paid on a salary basis. *See* 29 C.F.R. § 541.1. The primary dispute between the parties below was whether MP, by subjecting grade 6 through 9 employees to pay reductions as a result of part-day absences, had converted these employees from salary based to hourly employees. If so, MP could not claim that the employees were exempt under the "bona fide executive" exception to the FLSA. The parties each moved for summary judgment on this issue.

The district court concluded that even though the deductions for absences of less than a day may have been technically impermissible under the salary basis test, *see* 29 C.F.R. § 541.118(a), they were made inadvertently. *See Dole v. Malcolm Pirnie, Inc.*, 758 F.Supp. 899, 907-08 (S.D.N.Y.1991). Because the regulations permit an employer to correct an impermissible, but inadvertent, pay reduction, and, in so doing, preserve the affected employee's salaried status, *see* 29 C.F.R. § 541.118(a)(6), the district court concluded that MP's deductions for partial day absences did not, by themselves, render all grade 6 through 9 employees non-salaried. Accordingly, the district court granted MP's motion for partial summary judgment. However, the court conditioned the judgment on MP's promise to clarify its policy regarding partial day absences and to comply strictly with § 541.118(a). Because the Secretary had withdrawn all of its other claims, the district court entered judgment dismissing the action with prejudice. This appeal followed.

DISCUSSION

It is well-settled that a district court may grant a party's motion for summary judgment if the party can establish that "there is no genuine issue as to any material fact" and that, based on the facts presented, "[it] is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Here, the parties do not dispute the material facts at issue. Therefore, our only task is to determine whether the district court erred in concluding that, as a matter of law, MP's grade 6 through 9 employees met the salary basis test and thus were eligible for "bona fide executive" status. We review *de novo* the district court's judgment. *See Stroup v. GCS Service, Inc.*, 938 F.2d 20, 22 (2d Cir.1991); *Prunier v. City of Watertown*, 936 F.2d 677, 679 (2d Cir.1991).

Initially, we note that because the FLSA is a remedial act, its exemptions, such as the "bona fide executive" ex-

emption claimed in this case, are to be narrowly construed. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 456, 4 L.Ed.2d 393 (1960); *Mitchell v. Lublin, McGaughty & Assoc.*, 358 U.S. 207, 211, 79 S.Ct. 260, 263, 3 L.Ed.2d 243 (1959). Indeed, an employer bears the burden of proving that its employees fall within an exempted category of the Act. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97, 94 S.Ct. 2223, 2229, 41 L.Ed.2d 1 (1974); *Arnold*, 361 U.S. at 392, 80 S.Ct. at 452; *Donovan v. Carls Drug Co., Inc.*, 703 F.2d 650, 652 (2d Cir.1983). Consequently, MP must overcome the presumption that the "bona fide executive" exemption does not apply to its grade 6 through 9 employees. More specifically, MP must first prove that these employees were paid on a salary basis.

According to Department of Labor regulations accompanying the FLSA,

> [a]n employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compnsation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. *Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.* This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

29 C.F.R. § 541.118(a) (emphasis added). Generally, an employer that maintains the discretion to reduce an employee's compensation as a result of the employee's hours or the quality of the employee's work, may not consider the employee to be paid on a salary basis.

Based on the definition contained in § 541.118(a), we have previously held that an employee who can be docked pay for missing a fraction of a workday must be considered an hourly, rather than a salaried, employee. *See Whitmore v. Port Authority of New York & New Jersey*, 907 F.2d 20, 21 (2d Cir.1990); *Donovan*, 703 F.2d at 652; *accord Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir.1990) ("[s]ubjecting an employee's pay to deductions for absences of less than a day, including absences as short as an hour, is completely antithetical to the concept of a salaried employee."), *cert. denied*, —— U.S. ——, 111 S.Ct. 785, 112 L.Ed.2d 848 (1991). Most courts that have addressed the issue have agreed that if an employer has a policy of reducing an employee's compensation for fractions of days that the employee is absent from work, then the employer may not invoke the "bona fide executive" exemption with regard to that employee. *See Abshire*, 908 F.2d at 486; *Harrison v. District of Columbia*, Nos. 87-0809; -2275; 88-1028; -3223, 1991 WL 104260, at *5, 1991 U.S. District LEXIS 4992, at *14 (D.D.C. Apr. 16, 1991); *Wilks v. District of Columbia*, 721 F.Supp. 1383, 1385 (D.D.C.1989); *Banks v. City of North Little Rock*, 708 F.Supp. 1023, 1025 (E.D.Ark.1988); *Hawks v. City of Newport News*, 707 F.Supp. 212, 214-15 (E.D.Va.1988); *Persons v. City of Gresham*, 704 F.Supp. 191, 194 (D.Or.1988); *Knecht v. City of Redwood City*, 683 F.Supp. 1307, 1311 (N.D. Cal.1987); *cf. D'Camera v. District of Columbia*, 693 F.Supp. 1208, 1212 (D.D.C.1988); *but see Harris v. District of Columbia*, 709 F.Supp. 238, 242-43 (D.D.C.1989) (under employer's policy, no salary deductions were ever made for portions of days plaintiff-employees missed, thus court found that plaintiff-employees were eligible for bona fide executive exemption); *District of Columbia Nurses' Ass'n v. District of Columbia*, No. 87-1675, 1988 WL 156191, 1988 U.S. Dist. LEXIS 16500 (D.D.C. Jan. 28, 1988) (deductions for fractions of days were only made in rare circumstances in which employees had exhausted their leave, therefore such policy did not warrant a loss of exempt status).

Upon applying § 541.118(a)'s definition of "salary basis" to the facts of this case, the district court specifically noted, "we have our doubts as to whether [MP's] scheme of compensation comports with the requirements of [that section]." *Dole*, 758 F.Supp. at 903-04. Indeed, because MP subjected grade 6 through 9 employees to pay deductions on the basis of part-day absences, it is clear that, under the strict definition contained in § 541.118(a), these employees may not be considered salaried. *See Whitmore*, 907 F.2d at 21; *Donovan*, 703 F.2d at 652. However, as the district court recognized, our inquiry does not end at this point.

Section 541.118(a) specifically notes the existence of a number of exceptions to its mandate that, in order to be considered salaried, an employee must be paid a specified amount each week, notwithstanding the number of hours he or she works. Among the exceptions listed in the regulations is what is known as the "window of correction." *See* 29 C.F.R. § 541.118(a)(6). This provision allows an employer that makes an impermissible, but inadvertent, deduction to the compensation of an otherwise salaried employee to correct the error and thereby bring its compensation scheme into strict compliance with § 541.118(a). *See* 29 C.F.R. § 541.118(a)(6). Specifically, § 541.118(a)(6) provides:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, *where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer*

> *reimburses the employee for such deductions and promises to comply in the future.*

(Emphasis added). Basically, the "window of correction" permits employers to treat otherwise eligible employees as salaried, regardless of the employer's one-time or unintentional failure to adhere to § 541.118(a)'s requirements. *See Abshire*, 908 F.2d at 489; *Knecht*, 683 F.Supp. at 1311 ("The exception in subsection (6) applies to one-time or inadvertent deductions, not to a settled policy of subjecting the pay of employees to reductions.").

The district court concluded that MP could invoke the "window of correction" in this case. First, the district court determined that MP did not have a *policy* of docking pay from grade 6 through 9 employees. In making this assessment, the court relied on the fact that over the period in question, MP only made cash dockings to twenty-four employees totaling $3,269.78. Because the occurrences of docking were infrequent, the court determined that the deductions were not the result of an underlying pattern or scheme. Second, the court noted that MP has reimbursed those employees who suffered a pay loss as a result of its pay deductions for partial day absences. Finally, the court observed that MP revised its policy and promised to comply with § 541.118(a) in the future. Therefore, the district court found that MP could use the "window of correction" to "retroactively restore exempt status to [grade 6 through 9] employees who, *inter alia*, had their pay subject to reduction for absences of less than a day." *Dole*, 758 F.Supp. at 904. We disagree.

Based on the undisputed facts, we cannot find that MP met its burden of proving that the "window of correction" was available to it. Initially, we note that MP's Policy Guide, which was distributed to all new employees, stated unequivocally that:

> If a staff member loses time because of inclement weather, car problems, or medical reasons, s/he may

> arrange with his/her Group Manager to make up the time, or to charge it to vacation or optional holidays; otherwise it will be treated as an absence without pay. Whatever the arrangement, it should be recorded properly on the time sheet.

Thus, the Policy Guide clearly allowed proportional salary deductions for *all* employees—including those paid at grade levels 6 through 9—who did not complete full eight hour days. Similarly, MP's Handbook of Information for Staff provided:

> Time lost from work because of snow, car trouble, etc. is usually considered as absence without pay, but arrangements may be made with your Group Leader to make up the time or to charge it to vacation or optional holidays.

Here again, MP did not suggest that its policy of docking pay for portions of days that were missed was applicable only to lower pay grade employees. Moreover, MP's Director of Human Resources, John O'Neill, indicated to a Department of Labor Investigator that employees in pay grades 1 through 5, who MP conceded were subject to FLSA overtime requirements, were paid in essentially the same manner as those employees in grades 6 through 9. Indeed, the investigator ascertained that quarterly pay docking reports did not distinguish between employees in grades 1 through 9. Additionally, the investigator submitted an affidavit detailing interviews with eight employees in grades 6 through 9 who each understood that under MP's policy they would be docked pay for working less than a forty hour workweek unless they made up the time or charged it to sick leave or vacation leave. Finally, we note that a company's general requirement that its employees work at least eight hours in a day strongly suggests that the company views these employees as hourly and not salaried.

Although the district court emphasized that only twenty-four of the approximately 400 employees in ques-

tion actually had amounts deducted from their paychecks, it is clear that the remaining grade 6 through 9 employees were required to deduct from personal leave time or make up the hours they missed in order to avoid salary deductions. Furthermore, "[s]ection 541.118(a) does not require that a deduction for an absence of less than a day *actually* have been made, but only that an employee's pay be 'subject to' such a deduction." *Abshire*, 908 F.2d at 487 (footnote omitted); *see also Banks*, 708 F.Supp. at 1025 (exemption may be lost even if no actual deductions have been made); *Hawks*, 707 F.Supp. at 215 (same); *Persons*, 704 F.Supp. at 194 (same); *Knecht*, 683 F.Supp. at 1310 (same). Here, it is apparent that the employees were subject to deduction.

In sum, the evidence before the district court clearly showed that until December 8, 1988, MP maintained a policy of docking pay to grade 6 through 9 employees for fractions of the workday they missed. Thus, MP was not entitled to invoke the "window of correction" with regard to these employees and, as a result, they may not be considered to have been paid on a salary basis. Accordingly, the district court erred in granting MP's motion for partial summary judgment.

By enacting the overtime provision of the FLSA, Congress intended to ensure that appropriate overtime payments are made to eligible employees, rgardless of the magnitude of each employee's monthly compensation. Because we find that grade 6 through 9 employees were not exempt under the FLSA, we conclude that MP impermissibly withheld overtime payments that were due and owing.

CONCLUSION

Based on the foregoing, we reverse the judgment of the district court dismissing the action and remand this case for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 89 Civ. 3554 (GLG)

ELIZABETH DOLE, Secretary of Labor,
United States Department of Labor,
Plaintiff,

v.

MALCOLM PIRNIE, INC.,
Defendant.

March 4, 1991

Office of the Sol. U.S. Dept. of Labor, New York City (Percy S. Miller, of counsel), for plaintiff.

Epstein Becker & Green, P.C., New York City by Gilbert J. Ginsburg, and Robert L. Jauvtis (Bickel & Brewer, New York City of counsel), for defendant.

OPINION

GOETTEL, District Judge:

The narrow issue presented by these cross-motions for partial summary judgment is whether professional and managerial employees were exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA") because the salary test set forth in 29 C.F.R. § 541.118 was satisfied, notwithstanding the fact that deductions for absences of less than a day were made from the paychecks of some of these employees.[1]

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[1] Left for determination in the future is the issue of whether 43 Malcolm Pirnie employees, considered exempt by the company, were indeed entitled to that status because the nature of their jobs satisfied the "duties test" in the regulations. *See* 29 C.F.R. §§ 541.1. 541.2, 541.3.

BACKGROUND

Defendant Malcolm Pirnie, Inc. ("MP") is a consulting professional engineering firm with a major specialty in the area of water and waste water treatment for municipalities and industrial companies. Its roughly 900 employees are classified into eleven salary grades of which Levels 1 to 5 are considered non-exempt and Levels 6 to 11 are considered exempt. The jobs represented by grades 6 through 9 include positions such as engineers, accountants, architects, scientists, supervisors and administrators. Senior managers and officers of the corporation are grades 10 and 11. The exempt employees are well-compensated, earning salaries from over $30,000 per year to over $70,000 per year. When hired, each exempt employee is told what his or her monthly salary will be. Employees are paid twice a month. All MP employees are required to work forty hours per week and eight hours per day.

The FLSA requires that all employees working longer than forty hours per week be paid overtime at a rate of one and one-half times their regular hourly rate unless an exemption is applicable. MP considered its employees in grades 6 through 9 exempt from these overtime provisions. Nevertheless, the firm's policy was to pay overtime to employees in grades 6 through 9 in order to compensate them for the many hours they often worked beyond the required hours. Thus, an exempt employee working in excess of eight hours in a day or of forty hours in one week would receive overtime compensation. Though these employees were paid a monthly salary, in order to arrive at a rate at which to pay overtime, an hourly rate was calculated for each employee by dividing his or her total monthly compensation in half and then by 80. Grades 6 to 8 were paid overtime at an hourly rate of time and a quarter; Grade 9 received straight time pay. These practices were apparently typical of the industry.

During the period of May 1, 1987 to December 8, 1988, employees kept their own time sheets on which they

charged their time to client projects (which would later be billed) or to various overhead accounts. Among these accounts were accrual accounts such as vacation and personal illness, holidays, and absence without pay. Absences of a day or more could be charged by the exempt employees to their accrued sick or vacation time, or to absence without pay. Absences of less than a day, resulting for instance from tardiness or car trouble, would also be charged to the overhead accounts. The corporate policy guide stated that:

> [i]f a staff member loses time because of inclement whether, car problems, or medical reasons, s/he may arrange with his/her Group Manager to make up the time, or to charge it to vacation or optional holidays; otherwise it will be treated as absence without pay. Whatever the arrangement, it should be recorded properly on the time sheet.

Malcolm Pirnie Policy Guide, at 6-23. This language was echoed in the Malcolm Pirnie Handbook of Information for the Staff.[2]

During the period of May 1, 1987 to December 8, 1988, 24 employees in grades 6 through 9 had their compensation reduced after recording an absence of less than a day in the "absence without pay" column on their time sheet. The total amount of the payroll deductions was $3269.78. This money was later reimbursed to the affected employees.

On December 8, 1988, MP amended its policy concerning absences of less than a day and specifically instructed its employees in grades 6 through 11 to charge absences

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[2] It is unclear how employees were made aware of this corporate policy. The Policy Guide was distributed to the managers and officers of the company. Language in the introduction to the Handbook suggests that it was intended to be distributed to all new employees as an orientation and was intended to be a source of information for common questions.

of less than a day to a new overhead account called "Paid Absence" and not to their individual leave accounts.

In May 1989, the Department of Labor commenced this suit alleging that employees in MP's pay grades 6 through 9 during the period of May 1, 1987 through December 8, 1988 were not exempt from the overtime provisions of the FLSA and were therefore entitled to payment of overtime wages at the rate of time and one half their regular rate of pay. At stake is a sum of roughly $500,000 which is the difference between the actual overtime compensated at the MP rates and that time calculated at the statutory time and one half.

DISCUSSION

A. *Summary Judgment*

Federal Rule of Civil Procedure 56(c) provides that the trial judge shall grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. The threshold inquiry is whether there are genuine factual issues that must be resolved by a finder of fact because they may reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). On occasion, a case will be presented in which there is no dispute about the material facts but only as to their significance. Summary judgment is appropriate in such situations, *Transamerica Delaval Inc. v. Citibank, N.A.*, 545 F.Supp. 200 (S.D.N.Y.1982), so long as all inferences are drawn against the moving party, *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962) (per curiam), and reasonable minds could not differ as to the import of the evidence before the court, *Cable Science Corp. v. Rochdale Village, Inc.*, 920 F.2d 147, 151 (2d Cir.1990).

The material facts here are not in dispute. The parties agree that 24 MP employees in salary grades 6 through

9 were subjected to reductions in compensation as a result of their having recorded their time in the "absence without pay" account on their time sheets. The parties also agree that these parties were reimbursed for the deductions and that MP has promised to comply with Department of Labor regulations in the future. Additionally, there is no question that both the MP Policy Guide and Handbook instructed *all* employees losing time because of inclement weather, car problems, or medical reasons to make up the time or charge it to accrued time or an "absence without pay" account. What the parties dispute is whether the statements made in this corporate literature and the fact that such reductions were actually made in the compensation of 24 employees signified that the compensation of all employees was subject to reduction thereby destroying the exempt status of all MP employees in grades 6 through 9 during the period in question.

MP makes two arguments in support of its position that the employees in grades 6 through 9 were exempt from the FLSA overtime provisions. First, MP contends that these employees were salaried because their compensation was predetermined and not related to the number of hours actually worked. Second, MP argues that even if the payroll practices applied to these employees was not structured to satisfy the salary basis test of 29 C.F.R. § 541.118(a), by changing this policy, reimbursing the employees and promising to comply, the exempt status of these employees was preserved by a "window of correction" set forth in 29 C.F.R. § 541.118(a)(6). In its motion for partial summary judgment, the Department of Labor responds that the compensation of these employees was directly linked to the number of hours worked and that these employees were never exempt, therefore, from the provisions of the FLSA. The net result, the Department contends, is that the "window of correction" is not available at all to MP. These arguments will be considered below.

B. *Salaried or Hourly?*

The first question posed by the parties is whether the MP employees in grades 6 to 9 were salaried or hourly employees. After carefully considering the matter, we believe that this question need not be answered in order to successfully resolve the dispute between the Department of Labor and Malcolm Pirnie, Inc. However, the underlying jurisprudence, in addition to the applicable facts, provide the context in which the availability of the "window of correction" to MP must be addressed. Therefore, we will briefly sketch the relevant considerations.

Under 29 U.S.C. § 207(a) of the Fair Labor Standards Act, any employees working over forty hours per week must receive compensation for this extra time at a rate not less than one and one-half times the regular rate at which they are employed. A statutory exemption to this rule is provided for employees employed in a "bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).[3]

The scope of the § 213(a)(1) exemptions is defined in Department of Labor regulations found at 29 C.F.R. § 541.1, 29 C.F.R. § 541.2, and 29 C.F.R. § 541.3. The regulations demand that a person for whom the managerial exemption is claimed must be compensated on a "salary basis," 29 C.F.R. § 541.1(f), and that persons for whom the administrative or professional exemptions are claimed must be compensated on a "salary or fee basis," 29 C.F.R. § 541.2(e)(1); 29 C.F.R. § 541.3(e). An employer is not required by the FLSA to pay overtime to

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[3] Exemptions to the FLSA are narrowly construed in order to further Congress' remedial goal of providing employment protection. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 456, 4 L.Ed.2d 393 (1960). The employer is burdened with the duty of proving affirmatively that its employees come within these exemptions, *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97, 94 S.Ct. 2223, 2229, 41 L.Ed.2d 1 (1974), by "clear and affirmative evidence," *see Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir.1984).

any employee whose terms of employment satisfy the salary basis test of the regulations.[4] The Department of Labor maintains that the compensation plan and payroll practices applied to the MP employees in grades 6 to 9 do not satisfy this test of these regulations, as it is interpreted by 29 C.F.R. 541.118, resulting in the exemption being inapplicable to these employees.

It is well established that under the Department of Labor regulations, if an employee is considered salaried, his or her compensation may not be subjected to reduction for absences of less than a day. A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed.[5] Thus, the wey to our inquiry is whether the compensation plan, as structured, subjects the salary of the managerial, professional or administrative employee to reduction. "Either pay is fixed and immutable, and not subject to such deductions, or it is contingent." *Abshire v. County of Kern*, 908 F.2d 483, 487 (9th Cir.1990) (rejecting defendant's argument that employees are salaried because no deductions were actually made), *cert. denied*, —— U.S. ——, 111 S.Ct. 785, 112 L.Ed.2d 848 (1991). Fixed pay is a "salary;" pay which varies according to the quantity or quality of work results in hourly status.[6]

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[4] The regulations also require that the duties of the exempt employees meet certain criteria. With respect to the MP employees, the parties agree that the duties test has been satisfied.

[5] We have not been asked to decide whether paying overtime to salaried employees, thus increasing their compensation in relation to the hours worked, would affect their exempt status. *See Brock v. Claridge Hotel and Casino*, 846 F.2d 180 (3d Cir.), *cert. denied*, 488 U.S. 925, 109 S.Ct. 307, 102 L.Ed.2d 326 (1988). We acknowledge that payment of overtime *qua* overtime to an employee is an indicator of hourly status, *see id.*, but since traditionally many salaried employees receive bonuses which reward them for extra time put into a job, we see little reason why the payment of overtime would negate the exempt status of an employee.

[6] MP argues that the employees in grades 6 through 9 received a predetermined salary as required by the regulations because they

It is the potential for reduction that destroys exempt status.

Here, MP has acknowledged that some barred reductions did occur, albeit in a comparatively small number of cases. Moreover, MP concedes that its method of accounting for employee time perior to December 8, 1988 created the potential for these reductions. For example, MP admitted at oral argument that under its former practice, if an employee in grades 6 through 9 missed two hours of work, chose not to make up that time, and recorded it on the time sheet as "absent without pay," that employee would be docked two hours of pay. Furthermore, as MP also acknowledged, if that same employee missed two hours of work, then worked two hours to make up that time, the employee would not be paid overtime. Indeed, pointing to these practices, the Department of Labor contends that because some MP employees in grades 6 through 9 were docked pay pursuant to a stated corporate policy which theoretically subjected the compensation of all employees in these salary grades to reduction, none of the employees in those grades can be considered salaried and that they are all therefore eligible for statutory overtime. MP has maintained that these deductions were irrelevant [7] and that, therefore, the exempt status of the employees in grades 6 through 9 was not jeopardized.

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were told, when hired, what their annual salaries would be. However, a sum fixed in advance would not satisfy the concept of "salary" as used by the regulation because the regulation's plain language treats "salary" as a single, non-varying amount. If an MP employee in grades 6 through 9 missed less than a day of work without making up the time or charging it to an accrual account, if the company procedures listed in the corporate literature were followed to the letter, this employee's salary would be reduced. Thus, it was very possible for the employee's salary to vary across pay periods as a function of the actual hours worked and the compensation cannot be considered predetermined.

[7] MP argues that these deductions were made rarely and the compensation affected was de minimus. A number of courts have rejected this argument, holding that employees whose pay is "sub-

As stated earlier, resolution of this interesting question is not essential to disposition of these summary judgment motions. We will note, in passing that we have our doubts as to whether this scheme of compensation comports with the requirements of § 541.118(a). However, at this point, this court declines to characterize the status of the MP employees in grades 6 to 9 and assumes for the purposes of the next issue raised by the parties that the employees are not salaried.

C. *The Window of Correction*

The critical issue raised by these motions is whether the MP employees in grades 6 through 9 may retain their exempt status because MP has complied with a "window of correction" afforded by 29 C.F.R. § 541.118(a)(6) ("subsection (6)"). This regulation states:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the

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ject to reduction" for such absences are not salaried, even if no deductions have actually been made. *See, e.g., Banks v. City of North Little Rock*, 708 F.Supp. 1023, 1025 (E.D. Ark.1988) (no showing of actual deductions is needed); *Hawks v. City of Newport News, Va.*, 707 F.Supp. 212, 215 (E.D.Va.1988); *Persons v. City of Gresham, Or.*, 704 F.Supp. 191, 194 (D.Or.1988). *But see District of Columbia Nurses' Assoc. v. District of Columbia*, (reported at 1988 WL 156191) (D.D.C. Jan. 28, 1988) (holding that the occasional deduction made when the employee had exhausted his leave did not preclude exempt status).

In addition, MP maintains that, in reality, the compensation plan functioned differently from both how it was described in the company literature and how it was perceived by those employees who had made entries subjecting their pay to reduction and indeed, it never intended the directives in the employee literature to apply to employees in grades 6 through 9. These arguments are more applicable to the issue of whether MP may avail itself of the remedial provisions of the "window of correction."

> employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

The effect of this "window of correction" is to retroactively restore exempt status to employees who, *inter alia*, had their pay subjected to reduction for absences of less than a day.

Whether or not the "window of correction" is available to an employer who had been making unauthorized reductions in the pay of salaried employees is a matter of first impression in this circuit. We have assumed for the purpose of this argument that the MP employees were not salaried within the meaning of the regulations. The Department of Labor argues that the "window of correction" is only available to a company who can show from the outset that its employees were entitled to exempt status. *See Dole v. Walker and Armstrong*, slip op., at 5, No. CIV-88-1371-PHX-RCB (D.Arizona Apr. 26, 1990) (defendant was not entitled to use the "window of correction" because its deductions could "not be characterized as one-time or inadvertent deductions but rather reflect[ed] a settled policy of subjecting the pay of its employees to improper deductions"). The Department of Labor asserts that if this court had found that the MP employees were not "salaried employees" within the meaning of § 541.118(a), subsection (6) is simply not available to the offending company as a panacea.[8]

We believe the rule urged by DOL is too rigid. Subsection (6), by requiring examination of the facts of a par-

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[8] Here, we have made no such finding, assuming instead for the purposes of this analysis, that the finding was made.

ticular case, suggests a more fluid approach. For example, under this subsection, it is appropriate to consider such factors as the employer's intention in making the reduction to the employee's salary. Furthermore, by allowing remediation, subsection (6) creates an incentive for the employer to comply with the regulations. Under the rule suggested by the Department of Labor, any employer whose payroll practices would technically bar exempt status for its employees would never be able to take advantage of the "window of correction". Therefore, no employer would comply with the provisions of § 541.118 until it was forced to do so. Because the FLSA is a remedial statute, intended to benefit employees, its exemptions are to be narrowly construed while its remedial provisions must be construed liberally so that the words will accomplish the purpose at which the act is aimed. The Department of Labor's view of when the "window of correction" may be applied defeats the underlying purpose of subsection (6). We hold that a finding that employees are not salaried within the meaning of § 541.118 does not necessarily preclude use of the "window of correction."

Having concluded that the "window of correction" is available to MP, irregardless of how the underlying issue would be resolved, we turn to examine its actual application. MP reimbursed its employees who had suffered a loss of pay and informed its personnel of a revised leave policy for employees in grades 6 through 9.[9] In an affidavit signed June 27, 1990, MP's Vice President of Finance, Administration and Human Resources promised to comply in the future with the requirements of 29 C.F.R. § 541.118(a)(6).[10] MP argues that it availed it-

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[9] Under the revised policy, employees in grades 6 through 11 will charge sick days, vacation time and optional holidays in full-day increments. Absences of less than a full day are to be charged to a new account "Paid Absence".

[10] A promise to comply with the provisions of subsection (6) is somewhat meaningless. We believe, as evidenced by the restated MP policy, that the correct promise is to comply with all of the pro-

self of the "window of correction" by undertaking these remedial steps, as required by the regulation, and directs our attention to cases where the very steps taken by MP were considered proper utilization of the "window." For example, in *International Association of Fire Fighters, Alexandria Local 2141 v. City of Alexandria, Va.*, 720 F.Supp. 1230 (E.D.Va.1989), *aff'd*, 912 F.2d 463 (4th Cir.1990), the city had a policy of docking captains and lieutenants employed by the fire department for absences of less than one day. The policy was changed to conform with federal regulation and 26 employees who had experienced unauthorized reductions were reimbursed. The court found that by revising its policy, the City demonstrated its compliance with the regulation and its intent to comply in the future. This, along with reimbursing affected employees, was deemed proper utilization of the "window of correction"; the court held, therefore, that the City had satisfied the salary test of 29 C.F.R. § 541.118(a). *See also Hartman v. Arlington County, Va.*, 720 F.Supp. 1227 (E.D.Va.1989) (current compliance satisfies "salary test" of 29 C.F.R. § 541.118(a)), *aff'd*, 903 F.2d 290 (4th Cir.1990); *Harkins v. City of Chesapeake*, slip. op., No. 88-25-N (E.D.Va. Dec. 2, 1988).

We decline to follow the analysis pursued in the cases cited by MP because those courts only focused on the defendants' current compliance, assuming that the questioned deductions were inadvertent even when an established policy of making such deductions existed. *See, e.g., Fire Fighters Local 2141*, 720 F.Supp. at 1232. Subsection (6) establishes conditions which must be satisfied even before the current compliance and reimbursement necessary to preserve the exempt status of the disputed employees are considered. "[W]here a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will

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visions of § 541.118. MP should submit, therefore, a revised affirmation.

not be considered to have been lost if the employer reimburses the employee for such deduction and promises to comply in the future." 29 C.F.R. § 541.118(a)(6). Thus, before the employer's remedial actions may be assessed, it must be clear that the improper deductions were made only for the reasons set forth in the regulation. The reasons for the improper deductions were never addressed by the cases upon which MP relies. We will not, in contrast, allow use of the "window of correction" unless the regulation is fully satisfied.

MP argues that the "window of correction" is available because the deductions were made for reasons other than lack of work. Accepting MP's unchallenged representation that the firm was very busy and in fact growing, the argument is that the deductions were the result of an employee not working as opposed to work not being available for the employee to perform. The question is whether the phrase "made for reasons other than lack of work" encompasses the scenario MP proposes.

We must defer to an administrator's interpretation of its own regulations. *Udall v. Tallman*, 380 U.S. 1, 17, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). The problem here is that no interpretation of the phrase "reasons other than lack of work" has been made by the Administrator. Without the guidance of an administrative interpretation, we must then turn to standard statutory construction. In determining the scope of a regulation, we look first to its language, *see United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981), giving the "words used" their "ordinary meaning," *Richards v. United States*, 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962).

The paramount concern of subsection (6) is that a salaried employee's compensation not be reduced if work is not available for him or her to perform. Indeed, this notion appears twice within the one paragraph of this regulation. While the regulation makes it clear that an

employer may not use the "window of correction" when the salaried employee's compensation has been reduced because there is no work available, there is no suggestion that reductions for other reasons would be a bar to using the "window of correction."

The language of subsection (6) contains no ambiguity and we must conclude that "lack of work" means precisely that. No argument has been made by the Department of Labor that the MP reductions were made as a result of no work being available. Instead, the plaintiff's entire argument centers on the structure of the compensation plan. Because there has been no contention that the deductions in question were made as a result of work lacking for the employee, we must hold that one of the available criteria precedent to use of the "window of correction" by MP has been satisfied.

The regulation poses the conditions in the alternative. Its words indicate that so long as the improper deductions were made for "reasons other than lack of work" *or* inadvertently, the "window of correction" may be used by an employer who has reimbursed the affected employees and promised to comply with the regulations in the future. Under a plain reading of the regulation, we could therefore conclude that because 1) MP made the improper deductions for reasons other than lack of work and 2) it has reimbursed the affected employees and promised to comply with the regulation in the future, MP may use the "window of correction" to preserve the exempt status of the disputed employees in grades 6 through 9.

However, we have grave doubts that the Department of Labor intended the regulation to be read alternatively with respect to the reasons underlying the barred deduction. We believe that a better reading of the regulation would take these conditions conjunctively, requiring that the improper deductions have been made both for "reasons other than lack of work" and "inadvertently." *See Mc-*

Nally v. United States, 483 U.S. 350, 358-60, 107 S.Ct. 2875, 2880-82, 97 L.Ed.2d 292 (1987) (reading disjunctive prohibitions of 18 U.S.C. § 1341 in conjunction); *United States v. Schwartz*, 924 F.2d 410, 416 (2nd Cir.1991). This application is necessary so that employers, whose payroll policies preclude exempt status for employees under 29 C.F.R. § 541.118(a) because the employees' salaries have been subjected to reduction on the basis of the quality or quantity, may not escape the strictures of the Fair Labor Standards Act with merely a slap on the wrist. For example, if the regulation were read in the alternative, an employer who purposely reduced the salaries of its professional employees every time they were late for work would be able to take advantage of the "window of correction" because the reductions were made for "reasons other than lack of work." It is the subjecting of salary to reduction on the basis of quantity of work performed that precludes exempt status for these employees; to allow the employer to use the "window of correction" so easily would undercut the need for employer compliance with 29 C.F.R. § 541.118(a) prior to a Department of Labor investigation. Thus, we consider it essential that, in addition to having been made for reasons other than lack of work, the improper deductions also have been made inadertently. This would prevent the incongruous situation of employers cynically undertaking corporate policies which subject the salaries of their professional, managerial and administrative employees to reduction for reasons other than lack of work, knowing that the exempt status of the affected employees would be restored through reimbursement and a promise to comply, if the employer is caught. With that view, we will now consider whether the improper deductions made by MP were inadvertent.

The concept of inadvertence suggests a mistake or an oversight. One cannot be inadvertent while administering procedures which are deliberate and calculated. *See Knecht v. City of Redwood City*, 683 F.Supp. 1307, 1311

(N.D.Cal.1987). Those few courts addressing "inadvertence" have held that the subsection (6) exception was available to cover the fortuitous mistake made heedlessly. *See id.; Abshire*, 908 F.2d at 488-89. The Ninth Circuit has stated that:

> the thrust behind the regulations is to facilitate the determination whether an employer has a general policy of deducting for absences of less than a day or whether a deduction is made as a result of inadvertence or error. The exception in subsection (6) is for an employer that makes a one-time improper deduction and then corrects its error.

Abshire, 908 F.2d at 489.[11] *See also Dole v. Walker and Armstrong*, No. CIV-88-1371-PHX-RCB, *supra*.

The first inquiry is whether there was a general policy at MP which required that employees in grades 6 to 9 be docked pay for absences of less than a day. MP contends that at the time it developed its personnel policies and wrote its handbook, it intended the policy to apply only to the non-exempt employees in grades 1 through 5. Affidavit of John T. O'Neill (June 26, 1990), at ¶ 12. Moreover, it maintains that it had no idea at the time that its exempt employees would misconstrue the instructions contained in the Policy Guide and Handbook and charge time

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[11] Defendants correctly note that *Abshire* can be distinguished on the basis that the County never sought to avail itself of the "window of correction." Indeed, the Ninth Circuit noted that "[t]his provision [§ 541.118(a)(6)] is of no relevance in the case of an employer that . . . has adopted an express policy of deducting for part-day absences when an employee has not accrued leave, and has continued to adhere to such policy." *Abshire*, 908 F.2d at 489. This might be read to suggest that subsection (6) would cover situations in which there was current compliance. However, it should be noted that the court did draw a distinction between an inadvertent deduction and a policy of making deductions, which leads us to conclude that even the Ninth Circuit required inadvertence and compliance as prerequisites for application of the "window of correction." *See id.* at 488-89.

to "absence without pay." MP asserts that its actual policy with respect to absences of less than a day was to have the employee discuss his absence with his supervisor and then record this time in the appropriate overhead account (sick time or vacation) or as "Paid Absence." *Id.* at ¶ 11. In that regard, it argues that no employee in grades 6 through 9 was ever directed to record an absence of less than a day as "absence without pay." Indeed, by affidavit, some employees have stated that they never charged absences of less than one day to the "absence without pay" account nor did they feel obliged to do so.

The Department of Labor notes both the Employee Handbook and the Policy Guide indicate that when an employee was absent from work for less than a day, that employee was to make up the time, charge it to an accrual account or to record the time as "absent without pay," resulting in a salary reduction. Moreover, the investigator for the Department of Labor has stated, by affidavit, that the employees she interviewed understood that if they were absent from work and did not make up the time or charge it to an overhead account, they would be docked pay. Affidavit of Patricia Silberman (September 27, 1990), at ¶¶ 10-17. We note that none of the eight employees interviewed by the Department of Labor ever had been docked.

Another fact to be considered in determining whether a policy of docking exempt employees was in operation, is that over the 19 month period in question, cash dockings representing approximately 100 hours of work and involving 24 employees were made. However, during that same period roughly 400 employees worked well over one million hours. Thus, the acutal deductions made were *de minimis*.

The record suggests that, corporate literature notwithstanding, the intended and actual policy of MP with respect to the employees in grades 6 through 9 was to not

dock them for absences of less than a day. The Department of Labor has not made a showing to contradict this conclusion other than its investigator's affidavit containing the statements of some employees indicating otherwise. The circumstances, taken in total, suggest that the actual deductions made by MP were the result of confusion on the part of the employees who chose to self-dock. Indeed, Ms. Silberman's affidavit indicates that she was told by MP that some of the deductions were made by employees in their first week of employment. It is easy to see how an employee would make such an error because he or she was unaware of an informal policy.

Two errors in this case led to the dockings—both of these can be characterized as inadvertent. The first error is attributable to MP who erred in the drafting of its time sheets and its corporate literature, failing to foresee how some exempt employees might take the instructions literally. The second error is on the part of the employees who self-docked because they were unaware of how the company actually handled absences of less than a day by employees in grades 6 to 9.

Finally, though the dockings were not a one-time error, *see Abshire*, 908 F.2d at 489, their occurrence was infrequent enough to negate the possibility of a pattern. Thus, we conclude that the dockings were inadvertent and, in the context of subsection (6), not the result of a general policy requiring that the salaries of exempt employees be subjected to reduction for absences of less than a day.

The task here has been to interpret the undisputed facts presented in order to determine their significance. Though the explanation of why the bared reductions were made is disputed, summary judgment is nevertheless appropriate. We find that the conditions for proper utilization of the "window of correction" have been satisfied by Malcolm Pirnie, Inc. and the exempt status of the employees in grades 6 through 9 has been preserved by the firm's

reimbursement of the affected employees, and its promise to comply with the FLSA regulations in the future.

One final observation is in order. We believe that this matter came to the attention of the Department of Labor because overtime was paid to the professionals employed by MP to compensate them for many hours worked beyond a normal forty hour workweek. It is somewhat ironic that none of this litigation would have occurred if MP had not been generous in its treatment of its exempt employees.

CONCLUSION

Partial summary judgment is granted in favor of the defendant, Malcolm Pirnie, Inc., conditioned upon the company submitting a new affirmation of its promise to comply with 29 C.F.R. § 541.118(a). (*See* footnote 10, *supra.*) The Department of Labor's motion for summary judgment is denied with the same condition. Malcolm Pirnie, Inc. is ordered to submit a new affirmation within ten days of the date of this decision.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of February one thousand nine hundred and ninety-two.

Docket Number: 91-6138

LYNN MARTIN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellant,

v.

MALCOLM PIRNIE, INC.,
Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Defendant-Appellee Malcolm Pirnie, Inc.,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

/s/ [Illegible]
Chief Deputy Clerk

APPENDIX D

§ 213. Exemptions

(a) The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub. L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any

employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub. L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other acquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred mandays of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection)

(i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such empolyee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub. L. 93-259, § 23(a)(1), Apr. 8, 1974, 88 Stat. 69.

(10) any switchboard operator employed by an independently owned public telephone company which has no more than seven hundred and fifty stations; or

(11) Repealed. Pub. L. 93-259, § 10(a), Apr. 8, 1974, 88 Stat. 63.

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub. L. 93-259, §§ 9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69.

(15) any employee employed on a casual basis in domestic service employment to provide babysitting

services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).

(b) The provisions of section 207 of this title shall not apply with respect to—

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; or

(2) any employee of an employer engaged in the operation of a common carrier by rail and subject to the provisions of part I of the Interstate Commerce Act [49 U.S.C.A. § 181 et seq.]; or

(3) any employee of a carrier by air subject to the provisions of the Railway Labor Act [45 U.S.C.A § 181 et seq.]; or

(4) Repealed. Pub. L. 93-259, § 11(c), Apr. 8, 1974, 88 Stat. 64.

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(7) Repealed. Pub. L. 93-259, § 21(b)(3), Apr. 8, 1974, 88 Stat. 68.

(8 Repealed. Pub. L. 95-151, § 14(b), Nov. 1, 1977, 91 Stat. 1252.

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial

census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Bureau of the Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10) (A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 207(a) of this title; or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and whcih are used exclusively for supply and storing of water for agricultural purposes; or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other

employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 206(a)(1) of this title; or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an estabishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or

(16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

(17) any driver employed by an employer engaged in the business of operating taxicabs; or

(18) Repealed. Pub. L. 93-259, § 15(c), Apr. 8, 1974, 88 Stat. 65.

(19) Repealed. Pub. L. 93-259, § 16(b), Apr. 8, 1974, 88 Stat. 65.

(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or

(21) any employee who is employed in domestic service in a household and who resides in such household; or

(22) Repealed. Pub. L. 95-151, § 5, Nov. 1, 1977, 91 Stat. 1249.

(23) Repealed. Pub. L. 93-259, § 10(b)(3), Apr. 8, 1974, 88 Stat. 64.

(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children—

(A) who are orphans or one of whose natural parents is deceased, or

(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or

(25) Repealed. Pub. L. 95-151, § 6(a), Nov. 1, 1977, 91 Stat. 1249.

(26) Repealed. Pub. L. 95-151, § 7(a), Nov. 1, 1977, 91 Stat. 1250.

(27) any employee employed by an establishment which is a motion picture theater; or

(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operation does not exceed eight; or

(29) any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed.

(c) (1) Except as provided in paragraph (2) or (4), the provisions of section 212 of this title relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee—

(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of subsection (a) (6) (A) of this section) required to be paid at the wage rate prescribed by section 206 (a) (5) of this title,

(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or

(ii) his parent or such person is employed on the same farm as such employee, or

(C) is fourteen years of age or older.

(2) The provisions of section 212 of this title relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(3) The provisions of section 212 of this title relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

(4) (A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 212 of this title to the employment for not more than eight weeks in any calendar year of individuals who are less than twelve years of age, but not less than ten years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that—

(i) the crop to be harvested is one with a particularly short harvesting season and the application of section 212 of this title would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;

(ii) the employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

(iii) the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) individuals age twelve and above are not available for such employment; and

(v) the industry of such employer or group of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that—

(i) the individuals employed under such waiver be employed outside of school hours for the school district where they are living while so employed;

(ii) such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) such individuals be employed under such waiver (I) for not more than eight weeks between June 1 and October 15 of any calendar year, and (II) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection.

(d) The provisions of sections 206, 207, and 212 of this title shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

(e) The provisions of section 207 of this title shall not apply with respect to employees for whom the Secretary

of Labor is authorized to establish minimum wage rates as provided in section 206(a)(3) of this title, except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 207 of this title if he shall find, after a public hearing on the matter, and taking into account the factor set forth in section 206(a)(3) of this title, that economic conditions warrant such action.

(f) The provisions of sections 206, 207, 211 and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462) [43 U.S.C.A. § 1331 et seq.]; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island.

(g) The exemption from section 206 of this title provided by paragraph (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated).

(h) The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who—

(1) is employed by such employer—

(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or

(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 207 of this title.

(i) The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

(j) The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the processing of sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

(As amended Sept. 23, 1966, Pub. L. 89-601, Title II, §§ 201 to 204(a), (b), 205 to 212(a), 213 to 215(b), (c), 80 Stat. 833, 834, 836 to 838; Oct. 15, 1966, Pub. L. 89-670, § 8(e), 80 Stat. 943; June 23, 1972, Pub. L. 92-318, Title IX, § 906(b)(1), 86 Stat. 375; Apr. 8, 1974, Pub. L. 93-259 §§ 6(c)(2), 7(b)(3), (4), 8, 9(b), 10, 11, 12(a), 13(a) to (c), 14 to 18, 20(a) to (c), 21(b), 22, 23, 25(b), 88 Stat. 61 to 69, 72; Nov. 1, 1977, Pub. L. 95 to 151, §§ 4 to 8, 9(d), 11, 14(a), (b), 91 Stat. 1249, 1250 to 1252; Sept. 27, 1979, (Pub. L. 96-70, Title I, § 1225(a), 93 Stat. 468; Nov. 17, 1989, Pub. L. 101-157, § 3(c), 103 Stat. 939.)

APPENDIX E

§ 541.118 Salary basis.

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because

of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such days or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are provided in accordance with the particular law or plan. In the case of an industrial accident, the "salary basis" requirement will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer, provided the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on

a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

(b) *Minimum guarantee plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $155 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $200 in each week in which any work is performed, and an additional $50 which is made subject to deductions which, are not permitted under paragraph (a) of this section.

(c) *Initial and terminal weeks.* Failure to pay the full salary in the initial or terminal week of employment is

not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb. 19, 1975]

EFFECTIVE DATE NOTE: Paragraph (b) in § 541.118 was revised at 46 FR 3014, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraph (b) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.118 Salary basis.

* * * * *

(b) *Minimum guarantee plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $250 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrange-

ment also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $300 in each week in which any work is performed, and an additional $55 which is made subject to deductions which are not permitted under paragraph (a) of this section.

* * * *

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-89-15

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff,

vs.

PIERCE PROCESSING, INC., *et al.*,
Defendants.

[Filed Mar. 25, 1992]

Findings of Fact, Conclusions of Law, Decision and Order

INTRODUCTION

This matter is before the Court upon consent of the parties for final disposition. Doc. 28. Trial to the Court occurred on Monday, February 2, 1992.

This is an action brought by plaintiff, Lynn Martin, Secretary of Labor, United States Department of Labor (Plaintiff) against Pierce Processing, Inc. (PPI) and William Pierce (Pierce) under the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. § 201 *et seq.* (Act). Plaintiff alleges that PPI failed to pay certain of its employees overtime compensation to which they were entitled, 29 U.S.C. § 207(a)(1), and failed to maintain certain records (the home addresses of PPI's former employees) in violation of §§ 11(c) and 15(a)(5) of the Act. Defendants, PPI and Pierce, deny that they have failed to pay any employees unpaid overtime com-

pensation because the employees in question are exempt from the overtime provisions of the Act pursuant to § 13(a)(1) of the Act, 29 U.S.C. § 213(a)(1). Defendants also deny that they have failed to maintain records as required by the Act.

FINDINGS OF FACT

1. PPI is an Ohio corporation with offices in Cincinnati, Ohio and Louisville, Kentucky, and is engaged in business as an engineering consulting firm.

2. Defendant Pierce is the President of PPI and is primarily responsible for its day-to-day operations.

3. PPI consults with clients regarding the development and engineering of equipment for new products; the modification of existing products; and the packaging of products.

4. Defendants' annual dollar volume of business was in excess of $1,000,000 in 1986, 1987 and 1988, respectively.

5. Defendant, Pierce Processing, Inc., employs engineers, design managers and designers.

6. Between May, 1986 and May, 1988, PPI employed the following employees[1] as engineers, design managers or designers for various periods of time at an annual salary within the range set forth opposite the employee's name.

Employee		Salary Range
a.	Paul Bruggeman	$52,000
b.	Robert Cooks, Jr.	25,000-27,500
c.	Gregory DelVecchio	31,200-43,400
d.	Harry Driskill, Jr.	43,680-47,640

[1] These are the only employees Plaintiff claims were unlawfully not paid overtime pay in conformance with the Act. See Joint Stipulation 2 and 3. Doc. 21.

e.	Francis Fulcher	55,120
f.	Leslie Glickman	48,360-54,080
g.	Jack Hogue	43,680-47,650
h.	Robert Holt	46,280
i.	Howard Kennedy	55,120
j.	Mary Beth Manis	30,160
k.	Herbert McBride	42,640
l.	Theodore McCullough	47,840-50,750
m.	Christopher Olbur	47,840-50,960
n.	Giam Parihar	33,280-42,120
o.	Robert Poccottee	41,600-47,840
p.	Joseph Pravetz	49,400-51,480
q.	Jay Scales	22,048-23,090
r.	John Shryock, Jr.	45,160-48,465
s.	David Toth	45,760
t.	Kenneth Witsken	50,440-56,000

7. From May, 1986 to January, 1989, PPI's policy was to pay its engineers and designers on a salary basis, but to reduce their compensation on an hourly basis when employees voluntarily elected to take time off for personal reasons.

8. From May, 1986 to January, 1989, defendants' policy was to pay its engineers and designers, in addition to their salaries, a straight hourly rate for hours worked in excess of forty (40) in a work week. The hourly rate was established by dividing the employee's annual salary by 2,080 hours.

9. From May, 1986 to January, 1989, PPI's engineers' and designers' salaries were not subject to reduction because of variations in the quality or quantity of work they performed. When there was no work available, those employees were paid their fixed salaries and were instructed, for management purposes, to record the time during which no work was available as "office hours" and were paid for same.

10. Said employees were also paid when absent for holidays, vacations, and were eligible to be paid for ab-

sence due to jury duty or attendance in court as a witness. Additionally, they were eligible for sickness and disability benefits under a sickness and disability policy established by PPI.

11. During the investigation by the Wage and Hour Division, Pierce, on behalf of PPI, offered to reimburse the employees with those amounts that had been deducted from their pay when they took off for personal reasons.

12. Based upon his experience while working for other employers in the engineering business, and upon his general understanding that engineers, as professionals, are not paid overtime compensation, Pierce, in good faith believed that the pay practice that he established complied with the requirements of the Act.

13. PPI's pay practices were intended to provide additional compensation to the employees who, because of client demands or, at times, deadlines for completing a project, were required to work more than forty (40) hours during a work week. Further, the pay practices were established to provide the employees flexibility to establish their own hours in order to pursue family or recreational interests if, and when, they elected to do so.

14. As a result of being informed by the Wage and Hour Division that its pay practices violated the Act, effective January 1, 1989, PPI modified its pay practices in conformance with the requirements of the Act.

15. The parties agree that the employees in question meet all of the criteria for exemption from the overtime provisions of the Act, *see* 29 U.S.C. § 213(a)(1), 29 C.F.R. § 541.3, except for the requirement set forth in 29 C.F.R. § 541.3(e) that they be paid on a "salary basis". Defendants contend their employees were paid on a "salary basis"; plaintiff disagrees. *See* Joint Stipulation 6. Doc. 21.

16. PPI maintained adequate and accurate records of its employees and of the wages, hours, and other conditions and practices of employment of defendants, including the addresses of its present and former employees.

17. Pierce cooperated with plaintiff's compliance officer and produced all records requested with one exception. Pierce declined to produce the home addresses of PPI's former employees for fear that if those individuals were contacted, it would quickly become known in the industry that PPI was being investigated by plaintiff, which could have a negative impact on his business.

18. Plaintiff never issued an administrative subpoena requiring PPI to produce the addresses of former employees.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter pursuant to § 16 and § 17 of the Fair Labor Standards Act of 1938, as aended, 29 U.S.C. § 201 *et seq.*

2. Defendants constituted an "enterprise engaged in commerce" subject to the provisions of the Act. 29 U.S.C. § 203(r)(1), §§ 203(a)(1)(19)(i) and (ii).

3. Defendants are employers within the meaning of the Act. 29 U.S.C. § 203(d).

4. An employee is considered paid on a "salary basis" if, under his or her employment agreement, he or she regularly receives each pay period a predetermined amount constituting all or part of his or her compensation which is not subject to reduction because of variations in the quality or quantity of the work he or she performs. Subject to certain exceptions,[2] the employee must receive his or her full salary for any pay period in which he or she performs any work without regard to the number of days or hours worked. 29 C.F.R. § 541.118(a).

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[2] *See* ¶ 6, Conclusions of Law.

5. An employee will not be considered to be on a "salary basis" if deductions from his or her predetermined compensation are made from absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is unavailable. 29 C.F.R. § 541.118(a)(1).

6. Deductions are permitted when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. 29 C.F.R. § 541.118 (a)(2).

7. Where deductions are made when there is no work available, it indicates there was no intention to pay the employee on a "salary basis." Conversely, when deductions are not made when there is no work available, it indicates there was an intention to pay the employee on a salary basis. *See* 29 C.F.R. § 541.118(a)(6).

8. Where a deduction not permitted is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future. 29 C.F.R. § 541.118 (a)(6).

9. Defendants' failure to produce the home addresses of former employees did not constitute a violation of the record keeping provisions of the Act, including 29 U.S.C. §§ 211(a) and (c), or 29 C.F.R. § 516.7(b), because plaintiff failed to issue an administrative subpoena or in any way give defendants the opportunity to question the reasonableness of plaintiff's demand or to obtain protection therefrom, *see Donovan v. Long Steer, Inc.*, 464 U.S. 408, 415 (1984).

DECISION

The Act requires employers to pay their employees one and one-half their normal hourly rate for hours worked over 40 in a work week. 29 U.S.C. § 207(a)(1). PPI

did not comply with this requirement. Employers are exempt from this time and a half overtime requirement with respect to any employee employed in a *bona fide* executive, administrative, or professional capacity. 29 U.S.C. § 213(a)(1). The parties agree that the employees in question, as professionals, qualify in all respects for the exemption from the overtime provision of the Act, except for the requirement that they be paid on a "salary basis." *See* 29 C.F.R. § 541.3(a). Plaintiff contends the "salary basis" requirement is not met by defendants, because defendants reduced compensation on an hourly basis when employees voluntarily took time off for less than a day for personal reasons. Plaintiff contends this practice violated 29 C.F.R. § 541.118(a)(2) which only permits deductions on a daily basis.[3] It was defendants' practice to take deductions from an employee's salary when the employee was absent for personal reasons for less than a day. Plaintiff contends defendants' practice of deducting wages on an hourly basis violates the Act and denies defendants an exemption from the overtime payment requirements of 29 U.S.C. § 207(a)(1). The Court disagrees.

Defendants claim that because the word, "day," is not defined by the statute it is debatable whether or not defendants' salary deduction policies are in violation of 29 C.F.R. § 541.118(a)(2). For purposes of this decision, the Court finds it unnecessary to decide this debate and assumes, *arguendo*, that defendant's policy of deducting wages based upon voluntary hourly absences violates 29 C.F.R. § 541.118(a)(2). 29 C.F.R. § 541.118(a)(6) provides in pertinent part:

> Where a deduction not permitted by these interpretations is inadvertent or is made for reasons other than lack of work, the exemption will not be con-

---

[3] 29 C.F.R. § 541.118(a)(2) reads in pertinent part as follows:

Deductions may be made, however, when the employee absents himself from work for a *day or more* for personal reasons, other than sickness or accident. (emphasis added)

sidered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

Here, it is clear that defendants' deductions were never made because work was lacking, but only when employees were voluntarily absent for personal reasons unrelated to whether work was available. Defendants have offered to reimburse all employes for deductions made. Further, defendant has not only promised to comply with the Act in the future, but is currently in compliance. All other aspects of this case point to a situation where the employer intended to pay his employees on a "salary basis," intended to operate within the letter and spirit of the Act, and sought to treat and pay his employees in a manner that was professional, considerate and equitable.

The Court finds that defendants did not violate the record keeping provisions of the Act. *See* Conclusions of Law 9. The Court further finds that, subject to the conditions that (1) defendants reimburse their employees for the deductions made, and (2) defendants promise to comply with the Act in the future, the employees in question are, and were, exempt from the overtime payment provision of the Act.

ORDER

Defendants are hereby ORDERED to:

1. Reimburse their employees in conformance with this decision for salary deductions made; and

2. Promise to comply with the Act in the future.

Upon completions of one and two above, and written proof of same, the Court will enter a finding on behalf of Defendants.

IT IS SO ORDERED.

/s/ Jack Sherman
JACK SHERMAN, JR.
United States Magistrate Judge

Date: 3/25/92

APPENDIX G

STATE OF CALIFORNIA
GOVERNOR'S OFFICE
Sacramento, Ca 95214

[SEAL]

PETE WILSON
Governor

Telephone
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WILSON URGES CONGRESS, LABOR DEPARTMENT TO REMOVE $3 BILLION MANDATE ON STATE AND LOCAL GOVERNMENTS

FOR IMMEDIATE RELEASE

Contact: Bill Livingstone
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March 5, 1991

SACRAMENTO—Governor Pete Wilson today urged Congress to enact legislation to correct a technicality in a recent court ruling that could force state, county and city governments in California to pay as much as $3 billion for unpaid overtime work.

"The Court's ruling would absolutely cripple the budgets of hundreds of California cities and counties who are struggling to provide essential services during these times of limited dollars," Wilson said.

"It would also add another $1 billion to the state's deficit," Wilson said. "And force us to consider severe cuts in such crucial areas as healthcare, prisons, and education."

Specifically, Wilson asked Congress to fix a recent decision by the Ninth Circuit Court of Appeals where the court ruled that public agencies must pay overtime wages to "salaried" employees who can be docked for absences of less than one day, even if their pay has never been reduced.

Before the ruling, state and local governments paid overtime wages only to non-salaried or "hourly" workers. They were required to do so as a result of the 1974 Fair Labor Standards Act (FLSA) and subsequent Supreme Court ruling in 1985.

The case, *Kern County vs. Abshire 90-839*, involved 28 fire battalion chiefs in Kern County whose salaries ranged $40,536 to $49,476 a year. They were also given fringe benefits and extra pay for overtime (though not the traditional time-and-a-half given to employees who were paid on an hourly basis).

Though no fire chief was ever docked pay for missed work, the Court ruled that since Kern County recorded missed hours, the firemen were eligible for the premium overtime pay.

Since then, the state Office of Personnel has found a way to circumvent the ruling by removing the possibility of docking salaried workers and offering compensation time to employees in lieu of overtime pay. They have also sent notices to local governments suggesting that they follow similar procedures.

But despite the state's maneuvering, the ruling would still allow salaried employees in the public sector to file claims retroactively for up to two years of overtime.

Wilson said that there are roughly 40,000 salaried workers on the state payroll who could be eligible for as much as $1 billion in overtime pay if Congress fails to correct the technicality.

Meanwhile, California's cities and counties could be saddled with up to $2 billion in overtime costs to 125,000 employees, according to officials at the California League of Cities and the County Supervisors Association of California.

Los Angeles County alone claims the ruling could force them to pay $170 million in retroactive overtime to its

2,500 managers and 180 executive-level fire and police officials.

LETTER TO LABOR SECRETARY LYNN MARTIN

Wilson also sent a letter to newly-confirmed Labor Secretary Lynn Martin, asking her to change the way the Labor Department implements the FLSA by exempting state and local governments from the overtime provisions.

The overtime requirements "could result in millions of dollars in unanticipated (and uncontracted) overtime costs for public jurisdictions in California and other states," Wilson wrote.

The Department has promised to examine the provisions since 1987, but has failed to do so.

THE GARCIA DECISION

As a member of the U.S. Senate, Wilson successfully championed legislation to overturn a similar Supreme Court ruling in 1985, *Garcia v. San Antonio Metropolitan Transit Authority.*

The *Garcia* decision required state and local governments to pay their employees time and a half for overtime, and prohibited the virtually universal practice of giving employees compensatory time-off in lieu of overtime.

Facing stiff political opposition from the national leadership of organized labor, Wilson was able to fashion a compromise bill that allowed the continuation of "comp-time" rather than premium overtime pay.

"The *Garcia* decision is a blatant denigration of the sovereign rights of states and municipalities to manage their everyday governmental responsibilities," Wilson said at the time.

(5)

No. 91-1748

Supreme Court, U.S.
FILED
JUL 16 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

MALCOLM PIRNIE, INC., PETITIONER

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an employer that required certain employees to work eight hours a day, paid them overtime on an hourly basis, and followed a policy of reducing their pay when they worked fewer than eight hours a day may retroactively exempt those employees from coverage under the Fair Labor Standards Act of 1938 as "bona fide executive, administrative, or professional" employees by rescinding its policy, reimbursing past deductions, and promising not to reduce pay on account of absences of less than a day in the future.

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In the Supreme Court of the United States

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MALCOLM PIRNIE, INC., PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 949 F.2d 611. The opinion of the district court (Pet. App. 12a-30a) is reported at 758 F. Supp. 899.

JURISDICTION

The judgment of the court of appeals was filed on November 20, 1991. A petition for rehearing was denied on February 7, 1992. Pet. App. 31a. The petition for a writ of certiorari was filed on May 5, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7(a)(1) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 207(a)(1), requires an employer to pay each of its employees "at a rate not less than one and one-half times the regular rate at which he is employed" for any hours worked in excess of 40 hours a week. Section 13(a)(1) of the Act, 29 U.S.C. 213(a)(1), provides an exemption for "any employee employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor])."

The Secretary's regulations provide that, "[i]n order to attain 'bona fide executive' status, an employee must meet both a salary basis and a duties test." Pet. App. 2a; see 29 C.F.R. 541.1(f) (executive), 541.2(e)(1) (administrative), 541.3(e) (professional). Thus, an employee generally does not qualify as a "bona fide executive" if he is paid hourly or piecework wages rather than a salary.[1] An employee is considered to be paid "on a salary basis" if he regularly receives a predetermined amount of compensation that "is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. 541.118(a). As the district court explained, a "salaried employee is compensated

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[1] Administrative and professional employees may be paid on a fee basis. See 29 C.F.R. 541.2(e)(1), 541.3(e). Professional employees licensed to practice law or medicine need not be paid on a salary basis, 29 C.F.R. 541.3(e), in recognition of the traditional status of these occupations and the licensing requirements governing entry into them. See *Report on Definition of Exempt Employees—Report and Recommendations of Hearing Officer Stein* (1940), *reprinted in* 1949 Wage & Hour Manual (BNA) ¶ 20:116.

not for the amount of time spent on the job, but rather for the general value of services performed." Pet. App. 18a. Under the regulations, an employee may be considered to receive a salary if deductions are made for certain personal absences of "a day or more," but an employee will not be considered salaried if deductions are made for absences of less than a day. 29 C.F.R. 541.118(a)(2) and (3).

The regulations further provide, in a subsection referred to as the "window of correction," that the effect of an impermissible deduction for an absence of less than a day "will depend upon the facts in the particular case." 29 C.F.R. 541.118(a)(6). For guidance, the regulation distinguishes two situations:

> Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

Ibid. Thus, "[t]he effect of this 'window of correction' is to retroactively restore exempt status to employees who, *inter alia*, had their pay subjected to reduction for absences of less than a day." Pet. App. 21a.

2. Petitioner is a consulting engineering firm whose approximately 900 employees are classified into 11 pay grades. Pet. App. 3a, 13a. Petitioner considers employees in Grades 1 through 5 to be subject to the

FLSA's overtime requirements, but considers employees in Grades 6 through 9, which includes engineers, accountants, architects, scientists, supervisors, and administrators earning from $30,000 to $70,000 a year, to be exempt under the "bona fide executive" program. *Ibid.*[2]

During the period in question (May 1, 1987, to December 8, 1988), petitioner required all employees in Grades 1 through 9 to work at least eight hours a day. Pet. App. 3a, 13a. It also paid them at an hourly rate for time in excess of those required hours, but employees in Grades 6 through 9 received rates lower than the time and a half required by Section 7(a)(1) of the FLSA. Pet. App. 3a, 13a.[3] Under its February 1986 policy guide, petitioner also provided that employees who lost time "because of inclement weather, car problems, or medical reasons" had to make up the time or charge it to vacation or holidays; "otherwise it will be treated as absence without pay." *Id.* at 14a (quoting policy guide); see also *id.* at 10a (quoting employee handbook: "[t]ime lost from work because of snow, car trouble, etc. is usually considered as absence without pay, but arrangements may be made with your Group Leader to make up the time or to charge it to vacation or optional holidays").

Consistent with these directives, all of petitioner's employees kept time sheets to record all hours they were expected to work, whether or not the time was chargeable to a particular client or project. See Pet.

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[2] The status of employees in Grades 10 and 11, including senior management, Pet. App. 13a, is not at issue in this case.

[3] Employees in Grades 6 to 8 received an hourly rate of time and a quarter, while employees in Grade 9 received straight time pay for working more than eight hours a day or 40 hours a week. Pet. App. 13a.

App. 13a-14a. In some instances, employees who worked fewer than eight hours a day avoided a loss of pay by working extra hours or charging a partial day's absence to sick leave or vacation time. *Id.* at 10a, 16a. Between May 1, 1987, and December 8, 1988, however, 24 employees in Grades 6 through 9 charged about 100 hours of such absences to "absent without pay"; accordingly, they had their pay reduced proportionately and lost a total of approximately $3,300 for these absences. *Id.* at 3a, 14a, 28a.

On December 8, 1988, after the Department of Labor had informed petitioner that it was not paying its employees in Grades 6 through 9 on a salary basis, see C.A. App. 81-82, 211, petitioner changed its policy to require employees in Grades 6 through 9 to charge partial day absences to a new overhead account. Pet. App. 3a-4a. About a year later, after the Department had sued to recover back pay for the affected employees, petitioner repaid the $3,300 it had deducted for absences of less than a day and promised to comply with the salary basis regulation in the future. C.A. App. 3, 52, 60.

3. In its suit, the Department argued that petitioner's Grade 6 through 9 employees were not exempt from the FLSA's overtime requirements because they were paid on an hourly basis. The Secretary sought to require petitioner to pay its employees in Grades 6 through 9 "roughly $500,000 which is the difference between the actual overtime compensated at [petitioner's] rates and that time calculated at the statutory [rate]." Pet. App. 15a.

The district court granted petitioner's motion for summary judgment. It rejected the Secretary's argument that "the 'window of correction' is only available to a company who can show from the outset that

its employees were entitled to exempt status." Pet. App. 21a. Thus, the court did not decide whether petitioner's "employees in grades 6 to 9 were salaried or hourly employees." *Id.* at 17a; see *id.* at 20a ("resolution of this interesting question is not essential to disposition of these summary judgment motions"). It instead "concluded that the 'window of correction' is available to [petitioner], irregardless of how the underlying issue would be resolved." *Id.* at 22a.

The district court held that the improper deductions that petitioner acknowledged to have made were "inadvertent" within the meaning of Section 541.118 (a)(6). The district court acknowledged that the Ninth Circuit had held that a deduction is not "inadvertent" if "an employer has a general policy of deducting for absences of less than a day"; rather, the "window of correction" was designed "for an employer that makes a one-time improper deduction and then corrects its error." Pet. App. 27a, quoting *Abshire* v. *County of Kern*, 908 F.2d 483, 489 (9th Cir. 1990), cert. denied, 111 S. Ct. 785 (1991). The "corporate literature notwithstanding," and despite the fact that petitioner had docked the pay of a number of employees in Grades 6 through 9 who were absent for less than a day, the district court held that petitioner's deductions for less than a day's absence were "inadvertent." Pet. App. 28a. "Two errors in this case led to the dockings," the court said: "The first error is attributable to [petitioner] who erred in the drafting of its time sheets and its corporate literature, failing to foresee how some exempt employees might take the instructions literally. The second error is on the part of the employees who self-docked because they were unaware of how the com-

pany actually handled absences of less than a day by employees in grades 6 to 9." *Id.* at 29a. Although "the dockings were not a one-time error," the court concluded that "their occurrence was infrequent enough to negate the possibility of a pattern." *Ibid.*

4. The court of appeals reversed. Pet. App. 1a-11a. Consistent with the district court, see *id.* at 26a-27a, the court of appeals emphasized that the "window of correction" applied "to one-time or inadvertent deductions, not to a settled policy of subjecting the pay of employees to reductions." *Id.* 9a. The court of appeals disagreed with the district court's conclusion that petitioner "did not have a *policy* of docking pay from grade 6 through 9 employees." *Ibid.*

The court of appeals first noted that it was undisputed that petitioner's Policy Guide, which was distributed to all new employees, "clearly allowed proportional salary deductions for *all* employees—including those paid at grade levels 6 through 9—who did not complete full eight hour days." Pet. App. 10a. The court of appeals added that petitioner's Handbook of Information for Staff similarly stated that all employees were subject to deductions for absences of less than a day, and that petitioner's Director of Human Resources had indicated that employees in pay grades 6 through 9 "were paid in essentially the same manner" as employees in pay grades 1 through 5, who are admittedly subject to the FLSA. *Ibid.* The court of appeals held that "the evidence before the district court clearly showed that until December 8, 1988, [petitioner] maintained a policy of docking pay to grade 6 through 9 employees for fractions of the workday they missed." *Id.* at 11a. The court also "note[d] that a company's general requirement that its employees work at least eight hours in a day strongly suggests that the company views these employees as hourly and not salaried." *Id.* at 10a.

ARGUMENT

The court of appeals' decision is correct. The decision does not conflict with any decision of this Court or any other court of appeals, and review by this Court is not warranted for any other reason.

1. As this Court has long recognized, FLSA exemptions "are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); see also *Citicorp Indus. Credit Inc.* v. *Brock*, 483 U.S. 27, 35 (1987); Pet. App. 6a. Employers have the burden of proving their entitlement to an exemption. *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 196-197 (1974); *Arnold*, 361 U.S. at 394 n.11.

In the Department of Labor's view, the "window of correction" in Section 541.118(a)(6) is a narrow exception to the requirement that an employee does not qualify as a "bona fide executive" if he is paid hourly wages rather than a salary. The regulation makes clear that employees who are sent home when there is no work to be done are not "bona fide executives." It also makes clear, however, that "the exemption will not be considered to have been lost" on account of an "inadvertent" deduction for an absence of less than a day if the employer corrects the error. The district court and the court of appeals differed with respect to whether the deductions at issue in this case were "inadvertent." In our view, the court of appeals was clearly correct in deciding that a series of deductions made in accordance with written company policy may not be termed "inadvertent." In this Court, petitioner does not defend the district court's contrary conclusion.

Petitioner instead contends that an employer may subject employees to deductions for absences of less than a day pursuant to established policy, and nevertheless avoid liability for FLSA overtime pay if, when the policy comes to light, the employer changes it. That is not how the Department of Labor understands its regulation. The Department's construction helps to "prevent the incongruous situation of employers cynically undertaking corporate policies which subject the salaries of their professional, managerial and administrative employees to reduction for reasons other than lack of work, knowing that the exempt status of the affected employees would be restored through reimbursement and a promise to comply, if the employer is caught." Pet. App. 26a.

The language of the regulation does not require petitioner's construction. In arguing to the contrary, petitioner points to the language in the "window of correction" regulation stating that exempt status will not be considered to have been lost in some circumstances where an improper deduction "is inadvertent, *or* is made for reasons other than lack of work." Pet. 9. But that does not mean that employers can cure all improper but deliberate deductions other than those made for lack of work. Petitioner concedes as much by stating that a "good faith" requirement must be read into the regulation. Pet. 14 n.10. In fact, it is not necessary to rewrite the regulation, which begins by stating that the effect of an impermissible deduction "will depend upon the facts in the particular case." In the Department of Labor's view, where the employer has a written policy, which has been implemented repeatedly, of making deductions for absences of less than a day, the window of correction is not open.

There are cases where a deliberate deduction (if "made for reasons other than lack of work") for less than a day's absence would not close the window. For example, an employer might be able to cure an advertent, one-time deduction made because a group of professional employees, who clearly were paid on a salary basis, left work to attend a baseball game. Under all the facts of such a case, the decision to "dock" the employees' pay might not indicate that the employees were, in fact, paid by the hour, and the employer could cure the deduction under the window of correction without incurring liability to pay overtime under the FLSA. But nothing of the sort occurred here. To the contrary, petitioner had a written policy that, consistent with its other policies concerning employees in pay grades 6 through 9, treated those employees as wage earners rather than as salaried employees. Petitioner required those employees to work eight hours a day, calculated an hourly rate of pay for those employees, and paid them overtime, albeit at a rate less than that required by the FLSA, for hours worked in excess of 40 per week. Pet. App. 13a. In addition, their pay was generally subject to deduction for absences of less than a day.[4]

Whether petitioner's employees qualify as "bona fide executives" now that deductions are no longer made for absences of less than a day was not decided

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[4] Amicus National Security Industrial Association opines that "[d]eductions made for lack of work are evidence that the employee is really an hourly worker; other deductions do not necessarily bear that implication." Br. 11. But in this case, petitioner's policy of deducting pay for absences of less than a day, together with petitioner's other pay policies, indicate that employees in pay grades 6 through 9 were not salaried.

by the courts below. But under "the facts in th[is] particular case," 29 C.F.R. 541.118(a)(6), including petitioner's policy of deducting pay for absences of less than a day, the employees at issue were not exempt and petitioner could not retroactively convert them into exempt employees just by reimbursing past deductions and promising not to make deductions for absences of less than a day in the future.[5]

2. Contrary to petitioner's assertion, Pet. 10-12, review is not necessary to resolve any conflict between the decision below and *Hartman* v. *Arlington County*, 720 F. Supp. 1227 (E.D. Va. 1989), aff'd, 903 F. 2d 290 (4th Cir. 1990), or *International Ass'n of Fire Fighters, Alexandria Local 2141* v. *City of Alexandria*, 720 F. Supp. 1230 (E.D. Va. 1989), aff'd mem., 912 F.2d 463 (4th Cir. 1990). Although those cases suggest that the window of correction may be available to an employer that followed a policy of making impermissible deductions, it is not at all clear that the Fourth Circuit would apply the window of correction under the circumstances of this case.

The effect of an impermissible deduction "depend[s] upon the facts in the particular case," 29 C.F.R. 541.118(a)(6), and the facts in this case differ from the facts in *Hartman* and *Fire Fighters*. For example, petitioner's pay system violated the

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[5] Amicus American Consulting Engineers Council states that in engineering firms many employees, "even top executives, account for their time," and contends that the court of appeals' decision calls that practice into question. Br. 9. This amicus is attacking a straw man. The court of appeals did not conclude that petitioner's employees in grades 6 through 9 were not exempt from the FLSA because they accounted for their time. They were held not to be exempt because, unlike "top executives," they were required to work eight hours a day, were docked pay if they worked less, and were paid overtime for hours worked beyond 40 in a week.

"salary basis" requirement not just because of impermissible deductions, but also because it treated purportedly exempt workers just like non-exempt workers in a number of respects. For example, petitioner paid both groups of employees more for overtime hours, subjected their pay to reductions if they worked less than eight hours a day, and required them to work a fixed workday. Pet. App. 13a; see also *Harrison* v. *District of Columbia*, 30 Wage & Hour Cas. (BNA) 557, 561 (D.D.C. 1991) (holding that certain employees were not salaried because they "are treated like hourly employees in more respects than simply being subject to reductions in pay"). Petitioner's pay system is similar to the scheme in *Thomas* v. *County of Fairfax*, 758 F. Supp. 353 (E.D. Va. 1991), in which another district court within the Fourth Circuit ruled that employees paid on an hourly basis were not exempt employees. In contrast, the plaintiffs in *Hartman*, 720 F. Supp. at 1229, were paid without regard to the number of hours worked.[6]

Also, *Hartman* and *Fire Fighters* involved public employers, whose pay practices are generally "designed and intended to serve the public trust and were

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[6] It is not clear whether the district court correctly held that the firefighter employees in *Hartman* met the salary basis test. The employer in that case allegedly had a policy allowing reductions for partial day absences, and seven employees, who were not employed by the Fire Department, had their pay reduced for partial day absences. 720 F. Supp. at 1229-1230. The court did not expressly find that such a policy existed, however, see *id.* at 1229 ("the County may or may not have complied with the FLSA on this point in the past"), and stated that there was "no dispute that plaintiffs are salaried employees," *id.* at 1230. The court may therefore have permissibly concluded that if a policy did exist, it did not apply to the Fire Department. Cf. Pet. App. 10a (rejecting petitioner's argument that its policy existed only for non-exempt employees in Grades 1 through 5).

established long before State and local government employees were subject to the Fair Labor Standards Act." 56 Fed. Reg. 45,825 (1991). The pay practices of public employers are constrained by constitutional and statutory provisions. *Ibid.* Those practices are generally based on the principles "that governmental employees should not be paid for time not worked, and that there is a need to be accountable to the taxpayers for the expenditure of public funds." *Ibid.* These constraints have created difficulties for local governments in ascertaining and complying with the FLSA, which was extended to cover such employers fairly recently. See 56 Fed. Reg. 45,824-45,825 (1991); *Harkins* v. *Chesapeake*, 29 Wage & Hour Cas. (BNA) 1399, 1400 (E.D. Va. 1988). The Fourth Circuit may have been influenced by these considerations when it affirmed the district court's decisions in *Hartman* and *Fire Fighters*.

Moreover, it is not clear that the Second and Fourth Circuits disagree on the applicable legal principles. The Fourth Circuit affirmed *Hartman* on the district court's reasoning, 903 F.2d at 292, and affirmed *Fire Fighters* without opinion.[7] Thus, the Fourth Circuit has yet to discuss the prerequisites for application of the "window of correction." Further, the district court in those cases appeared to assume that the questioned deductions were "inadvertent," even though they also seemed to assume that a policy of making such deductions existed. See Pet. App. 23a-24a. The district court in *Hartman*, the case resulting in a brief published affirmance, explicitly stated that "the County had inadvertently deducted salary from seven

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[7] Unpublished opinions are not binding in the Fourth Circuit. See 4th Cir. I.O.P. 36.5, 36.6; *Hupman* v. *Cook*, 640 F.2d 497, 501 & n.7 (4th Cir. 1981).

exempt employees for absences of less than one full day." 720 F. Supp. at 1230. In this case, in contrast, petitioner does not now contend that it acted inadvertently.[8] In sum, any conflict between the results in *Hartman* and *Fire Fighters* and the decision below is not sufficiently fixed to merit this Court's attention at this time.

3. Petitioner has not established its claim, Pet. 16-17, and that of its amici, that the Department's interpretation of Section 541.118 will have a devastating impact on employers. Petitioner's problems arise not from the Department's interpretation of its regulation but from petitioner's pay policy, which combined exempt and non-exempt employees and treated both like hourly workers in many ways, including requiring deductions for absences of less than a full day. Petitioner could have avoided these problems simply by not instituting such policies: employers can pay salaries or pay overtime at the rate of time and a half.

Petitioner's "tens of billions of dollars" cost prediction, Pet. 17, is misplaced because it is based largely on the possible impact of the salary basis regulation on state and local governments. See Pet. 17 n.3. The Department of Labor recognizes that such public employers may well have difficulties complying with the salary basis regulation because they were only re-

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[8] Similarly, a court in the Fourth Circuit could conclude that the deductions affecting only seven non-plaintiff employees in *Hartman* and 26 non-plaintiffs in *Fire Fighters* over almost three years were infrequent enough to qualify as "inadvertent" under 29 C.F.R. 541.118(a)(6), while petitioner's 100 deductions affecting 24 Grade 6 through 9 employees over a 19-month period, along with an unspecified number of additional deductions affecting employees in lower grades, were not inadvertent.

cently subjected to FLSA requirements, see *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), and must sometimes comply with constitutional and statutory provisions limiting their pay practices.[9] Accordingly, the Department has proposed regulations that would allow state and local governments to avoid such potential liabilities. See 56 Fed. Reg. 45,824, 45,826 (1991) (interim final rule concerning future liabilities); *id.* at 45,828, 45,830 (proposed regulation concerning accrued liabilities).[10] Private employers such as petitioner, who have been on notice for more than 30 years that they must pay engineers on a salary basis if they wish to take advantage of the exemption, see *Craig* v. *Far West Eng'g Co.*, 265 F.2d 251, 257-260 (9th Cir.), cert. denied, 361 U.S. 816 (1959), cannot complain of similar difficulties.

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[9] As petitioner recognizes, Pet. 12 n.8, most of the litigation concerning the salary basis requirement involves state and local governments. Under the Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 2(c), 99 Stat. 788, those employers are liable for violations of the FLSA occurring after April 15, 1986.

[10] District courts in California recently invalidated the interim final regulation for not complying with the Administrative Procedure Act's notice and comment requirements. See *Morsch* v. *City of Los Angeles*, No. CV 91-0401 JGD (C.D. Cal. May 4, 1992); *Service Employees Int'l Union, Local 102* v. *County of San Diego*, 784 F. Supp. 1503 (S.D. Cal. 1992) and *Alex* v. *California*, 30 Wage & Hour Cas. (BNA) 1353, 1358-1360 (E.D. Cal. 1992). Legislation has also been introduced to change the salary basis rule for public employers. See S. 1670, 102d Cong., 1st Sess. (1991), discussed at 137 Cong. Rec. S12,253 (daily ed. Aug. 2, 1991); H.R. 5112, 102d Cong., 2d Sess. (1992), 138 Cong. Rec. H3087 (daily ed. May 7, 1992).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 91-1748

IN THE
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OCTOBER TERM, 1992

MALCOLM PIRNIE, INC.,
Petitioner,

v.

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY TO BRIEF IN OPPOSITION

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---

REPLY TO BRIEF IN OPPOSITION

Petitioner Malcolm Pirnie, Inc. ("Malcolm Pirnie") pursuant to Supreme Court Rule 15.6, hereby submits the following reply to respondent's brief in opposition to Malcolm Pirnie's petition for a writ of certiorari, addressing arguments first raised in that brief.

The respondent's brief contains factual errors which materially affect the Department of Labor's ("DOL's") argument as to whether the window of correction would be available in this case. *See* Brief in Opposition, page 11-15. Specifically, the objectionable text states:

> Similarly, a court in the Fourth Circuit could conclude that the deductions affecting only seven non-plaintiff employees in *Hartman* and 26 non-plaintiffs in *Fire Fighters* over almost three years were infrequent enough to qualify as "inadvertent" under 29 C.F.R. 541.118(a)(6), while petitioner's 100 deductions affecting 24 Grade 6 through 9 employees over a 19-month period, along with an unspecified number of additional deductions affecting employees in lower grades were not inadvertent.

Brief in Opposition, page 14, footnote 8. This footnote states that there were over 100 deductions affecting Grade 6 through 9 employees, a statement that is not supported by the record below. The record below states that there were 24 individuals who charged a total of about 100 man hours of absences (*not* 100 separate deductions) to "absent without pay" on time records.[1] The respondent correctly recites this fact on page 5 in its brief in opposition.

Petitioner further objects to the implication that there, in fact, were *more* than 100 deductions affecting exempt employees. The footnote states that the 100 deductions "were only for Grade 6 through 9 employees" and that there were "an unspecified number of additional deductions affecting employees in lower grades." Brief in Opposition, page 14, footnote 8. In fact, the employees in the lower grades were classified as non-exempt employees, and were paid time-and-a-half as required by the Fair Labor Standards Act. Furthermore, these employees were never party to the present litigation; presumably because DOL had no quarrel with Malcolm Pirnie's payroll practices with respect to its non-exempt employees in Grades 1-5.

Lastly, the brief in opposition contains another misstatement. Specifically, it claims:

---

[1] It is worth noting that approximately one million man hours were worked in the critical time period.

> In this case, . . . petitioner does not now contend that it acted inadvertently.

Brief in Opposition, page 14. To the contrary, Malcolm Pirnie does maintain that the deductions made were inadvertent, just as the district court held. That very position was briefed and defended before the Second Circuit and there is no statement in the petition for certiorari disclaiming it. The petition for certiorari is premised primarily on that portion of the Second Circuit's opinion which reflects a conflict between the circuits, specifically, that payment in strict accordance with the salary basis test is a condition precedent to utilizing the window of correction. Malcolm Pirnie continues to assert that the deductions made were inadvertent.

CONCLUSION

For the reasons contained in Malcolm Pirnie's Petition for a Writ of Certiorari and Reply to Brief in Opposition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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BRIEF OF THE AMERICAN CONSULTING ENGINEERS COUNCIL, AMERICAN INSTITUTE OF ARCHITECTS AND NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS AS AMICUS CURIAE SUPPORTING PETITIONER

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BRIEF OF THE AMERICAN CONSULTING ENGINEERS COUNCIL, AMERICAN INSTITUTE OF ARCHITECTS AND NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICUS CURIAE

The American Consulting Engineers Council ("ACEC"), the American Institute of Architects ("AIA") and the National Society of Professional Engineers ("NSPE") respectfully submit this brief amicus curiae in support of the pending petition for a writ of certiorari in this case. The purpose of this amicus filing is to bring to the Court's attention precisely how the decision below virtually eliminates the "window of correction" of the salary basis test, 29 C.F.R. § 541.118 (1991) and distorts the meaning of payment on a "salary basis" so that most employees can no longer be considered

exempt and are therefore entitled to overtime compensation. The Second Circuit's interpretation of the salary basis test, a regulatory creation of the Department of Labor ("DOL"), is wholly inconsistent with the purpose of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* It will also have a devastating financial impact on American businesses, including our members.

The American Consulting Engineers Council is a federation of 51 state and regional member organizations. These organizations have as their members approximately 4,500 firms representing over 175,000 employees in all facets of consulting engineering, from mechanical, electrical and structural, to environmental and civil engineering. ACEC's mission is to promote and protect the business interests of the consulting engineering profession. Malcolm Pirnie, Inc. ("Malcolm Pirnie") is a member of ACEC.

The American Institute of Architects is the largest and most influential professional association for architects, interns, and those directly involved in the practice of architecture. AIA has 296 state and local chapters and represents more than 56,000 members. Malcolm Pirnie is a corporate member of AIA.

The National Society of Professional Engineers is a multidisciplinary professional association with 54 state/territorial societies and 535 local chapters serving 75,000 individual members employed in industry, government, education, construction and private practice. NSPE's goal is to promote the interests of professional engineers in a manner consistent with the public safety, health and welfare. Many employees of Malcolm Pirnie are NSPE members.

Malcolm Pirnie's employment practices, including the ones at issue here, are fairly customary in the engineering and architecture professions. For example, like Malcolm Pirnie, many ACEC and AIA member firms pay engineers, architects and other exempt employees over-

time at a straight-time rate. This is a practice that has evolved over the years as a method to attract, fairly compensate and retain superior employees. In addition, like Malcolm Pirnie, most ACEC, AIA and NSPE members make deductions from leave banks for personal, sick or other reasons by the hour and have employees account for every hour worked on time sheets, to facilitate proper billing of clients and to comply with Federal, State and local government contract and auditor requirements. Each of these practices was called into question by the Second Circuit in *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), as being contrary to the salary basis method of payment. ACEC, AIA and NSPE believe that these practices, which are long established practices in the profession are entirely consistent with the salary basis method of payment and the FLSA.

SUMMARY OF ARGUMENT

The Second Circuit in *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, found that Malcolm Pirnie had a policy of deducting ("docking") pay of its exempt employees and therefore could not invoke the window of correction of the salary basis test, at 29 C.F.R. § 541.118. If this decision is permitted to stand, the exempt status of many employees, including professional engineers and architects, will be in doubt. The result is that many employees who are otherwise exempt may be entitled to overtime payments. Such an interpretation is contrary not only to the salary basis test but also to the intent and purpose of the FLSA.

ARGUMENT

I. THE SALARY BASIS TEST HAS BEEN INCONSISTENTLY INTERPRETED BY THE COURTS LEAVING EMPLOYERS WITHOUT CLEAR DIRECTION AS TO HOW THEIR SALARY SYSTEMS SHOULD BE STRUCTURED

The salary basis test has been an area filled with confusion over the past few years, with courts interpreting the requirements in many different ways. The consequences are potentially disastrous for all employers subject to the FLSA. This is because in order to be considered a bona fide exempt executive, professional, or administrative employee, an employee must be paid on a salary basis. 29 C.F.R. §§ 541.1(f), 541.2(e)(1), 541.3(e)(1991).

A. Deductions in Pay for Absences of Less than a Day

The salary basis test requires that in order to be considered salaried, an employee must:

> [r]egularly receive . . . each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

29 C.F.R. § 541.118(a). Some courts have held that even where no actual deductions have been made, if an employee is "subject to" a deduction, this is enough to destroy the exemption. *Abshire v. County of Kern*, 908 F.2d 483, 487 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 785 (1991) (pay was "subject to" deduction); *D'Camera v. District of Columbia*, 693 F. Supp. 1208, 1212 (D.D.C. 1989) (test is whether pay is "subject to" a deduction, not the frequency with which pay is actually reduced); *Banks v. City of North Little Rock*, 708 F. Supp. 1023, 1025 (E.D. Ark. 1988) (no showing of actual deductions needed); *Hawks v. City of Newport News, Va.*, 707 F. Supp. 212, 215 (E.D. Va. 1988) (fact that policy of reducing pay is not applied to plaintiffs does not alter

the policy); *Knecht v. City of Redwood City*, 683 F. Supp. 1307, 1311 (N.D. Cal. 1987) (test is whether pay is "subject to" a deduction); *Whitmore v. Port Auth. of N.Y. & N.J.*, 907 F.2d 20, 21 (2d Cir. 1990) (if an employee can be docked for fractions of a workday missed, then the employee is an hourly not salaried worker); *Harrison v. District of Columbia*, 30 Wage & Hour Cas. (BNA) 557 (D.D.C. 1991) (employee whose pay is subject to deduction for absences of less than a day is not salaried).

The Second Circuit, following *Abshire*, agreed that "an employee who can be docked pay for missing a fraction of a workday must be considered an hourly rather than a salaried employee." *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d at 615. On the other hand, other courts have determined that a salary is not "subject to deduction" where there are no actual deductions. *Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991); *Harris v. District of Columbia*, 709 F. Supp. 238, 241 (D.D.C. 1989) (salary basis test not violated where no actual deductions had been made); *District of Columbia Nurses Ass'n v. District of Columbia*, 29 Wage & Hour Cas. (BNA) 868 (D.D.C. 1988) (deductions for absences of less than a day are made only in the occasional situation where a plaintiff has exhausted leave and takes leave without pay, plaintiffs are therefore compensated on a salary basis).

B. Overtime Compensation for Exempt Employees

Another area with considerable confusion is whether an employer, consistent with the salary basis test, can pay an employee overtime compensation. The salary basis regulation permits additional compensation in addition to the salary. 29 C.F.R. § 541.118(b). The regulation specifically states:

> It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional

> compensation besides the salary is not inconsistent with the salary basis of payment.

Id. Nevertheless, recent case law has called into question the common practice of paying some form of overtime compensation to exempt employees and whether it is consistent with the salary basis regulation. The Third Circuit, in *Brock v. Claridge Hotel & Casino*, 846 F.2d 180 (3rd Cir.), *cert. denied*, 488 U.S. 925 (1988), was the first court to question such practices. In that case, the court stated that additional compensation is "inconsistent" with the nature of executive status. *Id.* at 185. The Ninth Circuit in *Abshire* stated that its conclusion that battalion chiefs were not paid on a salary basis was supported by the fact that battalion chiefs received overtime pay or compensatory time for time worked outside their normal schedules. According to the court:

> Such additional compensation for extra hours worked is also not generally consistent with salaried status.

Abshire v. County of Kern, 908 F.2d at 486. *See also Hilbert v. District of Columbia*, 784 F. Supp. 922 (D.D.C. 1992); *Thomas v. County of Fairfax, Va.*, 758 F. Supp. 353, 364-65 (E.D. Va. 1991) (additional pay is inherently inconsistent with the common-sense understanding of salaried executive status); *Banks v. City of North Little Rock*, 708 F. Supp. at 1024 (payment of a fixed amount plus additional hourly wages for extra hours worked is not consistent with salaried status); *Knecht v. City of Redwood City*, 683 F. Supp. at 1312 (overtime compensation for minutes worked beyond a specified time is indicative of a non-salary basis of payment).

On the other hand, Section 22b01 of DOL's Field Operations Handbook[1] (May 12, 1970) states:

> *Extra Compensation paid for OT.*
>
> Extra compensation may be paid for OT to an exempt employee on any basis. The OT payment need

[1] The Field Operations Handbook is the operational manual which provides guidance for Wage and Hour investigators in conducting wage and hour, including FLSA, investigations.

not be at time and one-half, but may be at straight time, or flat sum, or on any other basis.

See also Wage and Hour Opinion Letters dated March 16, 1984, January 13, 1983, and March 3, 1970.[2] Other courts have also explicitly found that employees exempt under the Act may be paid overtime (on whatever basis) for hours worked beyond their regular schedule. *Pautlitz v. City of Naperville*, 781 F. Supp. 1368 (N.D. Ill. 1992) (supervisory overtime should be applauded rather than penalized); *International Ass'n of Fire Fighters, Alexandria Local 2141 v. City of Alexandria, Va.*, 720 F. Supp. 1230, 1232 (E.D. Va. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990) (practice of additional pay for each hour worked beyond regular schedule will not defeat exemption because it is expressly permitted by the labor regulations); *Hartman v. Arlington County, Va.*, 720 F. Supp. 1227, 1229 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990) (practice of overtime pay is expressly permitted by § 541.118(b)); *York v. City of Wichita Falls, Tex.*, 944 F.2d 236, 242 (5th Cir. 1991) (overtime payments do not defeat salaried status).

Many ACEC and AIA member firms like Malcolm Pirnie pay additional compensation to professional engineers and architects for "overtime" worked in excess of 40 hours (or less) in a workweek. Frequently this time is compensated on a straight-time basis. This practice is fairly common in these professions.

C. Deductions from Leave Banks

Another issue in the salary basis test that has become uncertain is whether partial-day absences may be deducted from exempt employes' leave banks. Most, if not all, employers, including most ACEC and AIA member firms (and NSPE members), have leave banks (i.e. sick, vacation, personal) that may be drawn on in increments

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[2] Reprinted as Appendix A.

of less than a day. This is a standard practice in American industry. Still, a footnote to the *Abshire* case stated:

> A strong argument can be made that even if deductions were required only from fringe benefits such as leave time, and not from base pay, the affected employees would still not qualify as "salaried."

Abshire v. County of Kern, 908 F.2d at 487 n.3. In *Service Employees Int'l Union, Local 102 v. County of San Diego*, 784 F. Supp. 1503 (S.D. Cal. 1992), the court found that "docking of an employee's leave time for absences from work is as contrary to the notion of salaried status as the docking of base pay." *Id.* at 1510. *See also Thomas v. County of Fairfax, Va.*, 758 F. Supp. at 366 (docking of one hour's leave affronts the concept of a salaried executive).

By contrast, in a July 17, 1987 Opinion Letter, DOL advised as follows:

> Generally, deductions for absences of less than a day are not permitted under the regulations for any reason. However, an employer can require an employee to substitute paid leave for such absences without losing the exemption for that week.

Ginsburg *et al.*, *Fair Labor Standards Handbook*, Appendix III at 160 (1989).

D. Recording of Time and Requiring Employees to Work Set Hours

One of the most disturbing portions of the *Martin v. Malcolm Pirnie, Inc.* decision is the court's conclusion that requiring exempt employees to work a fixed schedule and for a minimum number of hours is inconsistent with the salary basis test. Recently, another court also concluded that such requirements along with requiring exempt employees to record the time they work on some form of a time sheet or time card is inconsistent with "salaried status." *Service Employees Int'l*, 784 F. Supp. 1503, citing *Abshire*, 908 F.2d at 486 (a salaried employee is

compensated not for the amount of time spent on the job but rather for the general value of the services performed). *See also Morsch v. City of Los Angeles*, CV-0401 JGD (C.D. Cal. May 4, 1992).[3]

Such judicial interpretations are wholly inconsistent with how professional practices are conducted. Time sheets are frequently used by our members, in large part so that we can properly bill clients. Although exempt employees do and should enjoy flexibility in their work schedules, it goes without saying that some regularity is required so that clients, customers, etc. are able to make contact with employees when needed. The purpose of work schedules and set hours is generally to ensure that the firm has adequate coverage during core business hours and that staff will be available to work on projects in a collegial capacity. Furthermore, to suggest that by making exempt employees accountable for their time is somehow contrary to what it means to be an exempt executive, administrative or professional employee is ludicrous. In most ACEC and AIA firms all principals (including NSPE members), even top executives, account for their time on time sheets.[4]

E. Use of the Window of Correction

Finally, in addition to this confusion among the circuit Courts regarding just what constitutes a violation of the salary basis test, there is also considerable confusion over when an employer can avail itself of the window of correction and thereby avoid the catastrophic consequences of having made a mistake in its pay practices. Frequently, the mistake is due to the confusion created by the cases and opinions discussed above.

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[3] Reprinted as Appendix B.

[4] In fact, those firms who perform Federal, State and local government contracts *must* account for each hour worked in order to be reimbursed and for audit purposes.

According to the Second Circuit in *Martin v. Malcolm Pirnie, Inc.*, the window of correction provision:

> [a]llows an employer that makes an impermissible, but inadvertent, deduction to the compensation of an otherwise salaried employee to correct the error and thereby bring its compensation scheme into strict compliance with § 541.118(a).

Martin v. Malcolm Pirnie, Inc., 949 F.2d at 616. The Second Circuit found that, although Malcolm Pirnie had reimbursed employees who had had a relatively small amount of pay deducted and clarified its policy, Malcolm Pirnie had not "met its burden of proving that the 'window of correction' was available to it." *Id.* at 616. The Second Circuit appears to require that employees be compensated in accordance with all the salary basis requirements *before* an employer can avail itself of the window of correction, a requirement that all but obliterates the remedial purpose of the regulation. In effect, the Second Circuit precludes the use of the window of correction for most errors since the impermissible deductions must be not only "inadvertent" but "one-time or unintentional" as well. *Id.*

Furthermore, the window of correction, according to its clear language, allows correction of any deduction that is "inadvertent, *or* is made for reasons other than lack of work." 29 C.F.R. § 541.118(a)(6) (emphasis added). The plain language of the regulation states "inadvertent or", yet some courts have interpreted this language as requiring inadvertence *and* reasons other than lack of work, a reading advanced by the Department of Labor. *Dole v. Malcolm Pirnie, Inc.*, 758 F. Supp. 899 (S.D.N.Y.), *rev'd on other grounds*, 949 F.2d 611 (2d Cir. 1991). Other courts have directly rejected this interpretation. *Martin v. Pierce Processing, Inc.*, No. C-1-89-15 (S.D. Ohio Mar. 25, 1992)[5] (employer correctly used

[5] Reprinted in Petitioner's Petition for Writ of Certiorari at **Appendix F.**

window of correction and intended to pay employees on a salary basis where deductions were never made because work was lacking, but only when employees were voluntarily absent for personal reasons unrelated to whether work was available); *Keller v. City of Columbus, Ind.*, 778 F. Supp. 1480, 1487 (S.D. Ind. 1991) (if the window of correction applies, then it is as if the employees' salaries were never subject to reduction; if a policy allowed a deduction "for reasons other than lack of work" then the "window of correction" is open regardless of whether the error was inadvertent).

II. THERE IS AN URGENT NEED FOR JUDICIAL CLARIFICATION OF THESE CRITICAL ISSUES IN A MANNER WHICH WILL NOT RESULT IN A DEVASTATING FINANCIAL PENALTY TO EMPLOYERS AND A WINDFALL TO OTHERWISE EXEMPT PROFESSIONAL AND MANAGERIAL EMPLOYEES

Such confusing and divergent opinions on all of these issues (deductions from pay and leave banks, overtime compensation, recording of time and set hours, use of the window of correction) have had one net result: employers who desire to comply with the requirements of the FLSA and seek to have their policies comport with the salary basis test are at a loss. Employers are understandably reluctant to abandon long established practices, such as additional overtime compensation for exempt employees, in light of such contradictory opinions. This is especially true since many of these practices *benefit* employees, such as providing paid leave and additional compensation for overtime. It is ironic that these benefits are now at risk because of some opinions which distort the meaning of the salary basis test and lose sight of the purpose of the FLSA.

DOL has attempted to grant regulatory relief from the salary basis test to public employers. *See* 56 Fed. Reg. 45,824 *et seq.* (9/6/91, Interim Final Rule, Proposed Rule

and Request for Comments).[6] Yet the same public employer problems identified by DOL in its notice are equally applicable to the private sector as well.[7] DOL in its Federal Register notice recognized that the salary basis test had spawned a confusing and contradictory body of interpretive case law. DOL also detailed the confusion with the window of correction. DOL recognized that:

> These diverging judicial interpretations and accompanying confusion have developed resulting in the exposure of governmental employers to potentially enormous and generally unexpected back wage liabilities to employees some of whom would clearly be exempt if duties and amount of compensation alone were examined.

56 Fed. Reg. at 45,829.

Just as public employers are subject to enormous exposure given these various interpretations, so too are private employers. While DOL has attempted to resolve these issues for the public sector, no such effort has been made on behalf of the private sector. The result is that many highly compensated professional and managerial employees who have no expectation of overtime pay, may in fact be entitled to such pay. Such a result is completely contrary to the purpose of the FLSA. The purpose of the FLSA is to "eradicate from interstate commerce the evils attendant on low wages and long hours of service in industries engaged in commerce or in the production of goods for commerce." *Wirtz v. Patelos Door Corp.*, 280 F. Supp. 212, 216 (E.D.N.C. 1968). The FLSA sought to

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[6] DOL's interim final regulations have been struck down by at least two courts because they failed purportedly to provide a proper notice and comment period pursuant to the Administrative Procedures Act. Presumably the courts objected to the retroactive provisions in the regulations. *See Service Employees Int'l*, 784 F. Supp. 1503; *Alex v. California*, 30 Wage & Hour Cas. (BNA) 1353 (E.D. Cal. 1992).

[7] The salary basis test, 29 C.F.R. § 541.118, is the same for public and private employers.

protect those members of the labor force who could not protect themselves from substandard wages and excessive hours. Those employed in executive, administrative and professional positions were deemed to not ordinarily need this protective legislation and thus were exempted from the minimum wage and overtime protection of the FLSA. *Id.* It is unlikely that Congress envisioned, in 1938, DOL enforcing the overtime provisions of the FLSA to "protect" highly paid exempt employees such as those at issue in the *Malcolm Pirnie* case.

The real irony in this case is that by all measures Malcolm Pirnie was and is a model employer. It paid the employees in question good salaries, provided leave benefits (vacation, sick and personal leave) and paid additional compensation for overtime.[8] But because its policies for deductions in pay for absences of less than a day were unclear it was investigated by DOL. It then attempted, as any good employer would, to remedy the problem by using the window of correction. The Second Circuit determined that it could not do so.

Given the confusing web of cases on the salary basis test, employers are at a loss over how to proceed. Furthermore, the potential liability in these cases for all employers, including our members, is enormous. Every time an employer's salary system is found to violate the salary basis test, the employer must go back, two or three years, and pay overtime at a rate of time-and-a-half for all hours worked by its exempt employees over 40 in a workweek. The devastating financial impact is not offset by

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[8] The district court below observed that it believed:

> [t]hat this matter came to the attention of the Department of Labor because overtime was paid to the professionals employed by MP to compensate them for many hours worked beyond a normal forty hour workweek. It is somewhat ironic that none of this litigation would have occurred if MP had not been generous in its treatment of its exempt employees.

Dole v. Malcolm Pirnie, Inc., 758 F. Supp. at 908.

any societal purpose and is, in fact, completely contrary to the fundamental purpose of the FLSA. These damage awards do not benefit minimum wage or blue collar workers but rather fatten the pockets of already well-compensated executive, administrative and professional employees who neither earned nor expected this judicially imposed windfall.

The most serious and immediate problems can be rectified by this Court clarifying when the window of correction can be used by an errant employer. If an employer who makes a good faith mistake in its payroll practices can correct it without catastrophic consequences, the worst part of this problem will be solved. A ruling by this Court that the Second Circuit erred in holding that the window of correction was not available to Malcolm Pirine will substantially ameliorate the problems created by the lower court rulings on the various "salary" issues discussed herein.

Certiorari should be granted in this case. The issues presented affect not just professional engineers and architects, but the ever growing number of service industries in the U.S. The case has broad application to virtually every employer in the United States. The issues raised have become the subject of an increasing wave of litigation with enormous consequences. The case law in this area is hopelessly confused by conflicting circuit court interpretations with billions of dollars of potential back pay liability riding on the outcome. Furthermore, given the narrow reading, by many courts, of the window of correction even an employer who wants to correct errors in its payroll system may not be permitted to do so. The need for resolution by this Court has become critical as the current unsettled state of the law poses a severe threat to the continued viability of ACEC and AIA member firms (and NSPE members) as well as nearly all American employers. Accordingly, this Court should grant certiorari to clarify and resolve the important issues presented.

CONCLUSION

ACEC, AIA and NSPE respectfully request that for the foregoing reasons, Petitioner Malcolm Pirnie's Petition for Certiorari be granted.

Respectfully submitted,

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* Counsel of Record

APPENDICES

APPENDIX A

[Mar. 16, 84]

84.195C/OLIR 3722

Dear

This is in reply to your correspondence of February 22 enclosing a copy of a letter from Mr. Gordon L. Rosby of the Engineers-Architects, Professional Corporation in Grand Forks, North Dakota. Your constituent requests information as to whether there are rules or regulations which govern the handling of overtime hours worked by salaried professional employees who are exempt under section 13(a)(1) of the Fair Labor Standards Act (FLSA). Mr. Rosby asks, for example, whether such employees should be given compensatory time-off for overtime hours worked.

Section 13(a)(1) of FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined and delimited in 29 CFR Part 541, a copy enclosed. An employee may qualify for exemption as a bona fide professional employee if all the tests relating to duties, responsibilities, and salary, as discussed in section 541.3 of the regulations, are met.

In a telephone conversation with a member of my staff, Mr. Rosby was advised that employees who meet the requirements for the exemption for bona fide professional employees need not receive any additional form of compensation beyond the guaranteed salary required by the regulations for hours worked in excess of 40 in a workweek. Mr. Rosby was also advised that although it is not required by FLSA, an employer may provide additional benefits, such as compensatory time-off, bank credit hours, or monetary compensation, to such exempt employees when they work in excess of 40 hours in a workweek.

Since no additional form of compensation is required by FLSA for such exempt employees, there are no rules or

regulations which address the matter of your constituent's concern. We wish to point out, however, that where an employee does not qualify for this exemption, the employee must be paid in accordance with the monetary provisions of FLSA, including the payment of overtime premium pay for hours worked in excess of 40 in a workweek, unless exempt under some other section of the Act.

We trust that the above satisfactorily responds to your inquiry. Please let us know if you have further questions.

Sincerely,

WILLIAM M. OTTER
Administrator

JAMES L. VALIN
Assistant Administrator
Wage and Hour Division

83.367

[Jan. 13, 1983]

Dear ———

This is in reply to your letter of December 24, 1982, concerning the salary basis of payment requirement under section 13(a)(1) of the Fair Labor Standards Act (FLSA).

Your letter describes a proposed compensation plan your client wishes to adopt for certain professionals. Your letter asks us to presume that all other requirements for the professional exemption in section 541.3 of Regulations, 29 CFR Part 541 are met.

Your client's professionals would be guaranteed a salary of $500 per week, and in addition, $10 to $15 per hour extra pay for work performed over 40 hours in one workweek, or after 80 hours in a two-week period, or even after 160 hours in a month. If the professional works less than 40 hours in a workweek, such employee will receive the full salary of $500. Your client intends to take the permissible deductions from the professional's salaries as provided in section 541.118(a)(2)-(5) of 29 CFR Part 541.

We agree with your conclusion that the extra compensation that your client proposes to pay in addition to the salary is not inconsistent with the salary basis of payment and is in accordance with section 541.118(b). Further, we believe that your client's proposed compensation plan generally appears to meet the requirements in section 541.118.

However, we have some reservations concerning the provision in the "Compensation Agreement" allowing the employer to adjust the salary and extra compensation as determined by the employer. If, for example, such proviso were used to make frequent adjustments in compensation, it would raise a serious question as to whether these professionals were being paid "on a salary basis" within the meaning of the Regulations.

[Mar. 3, 1970]

Dear ———

This is in further reply to your letter of February 12, 1970, concerning whether additional payments for work in excess of 44 hours per week to otherwise bona fide exempt employees is in accordance with the requirement that such employees be paid "on a salary basis" under section 13(a)(1) of the Fair Labor Standards Act.

The information you have provided assumes that the employees concerned meet all the duty requirements for exemption as bona fide executive, administrative, or professional employees, as set forth in the appropriate section of Regulations, Part 541. Each employee is paid a predetermined salary of at least $140 a week which is not subject to reduction because of variations in the quality or quantity of the work performed and without regard to the number of hours or days worked. His salary is not reduced for working less than 44 hours in a workweek, except for certain allowable deductions set forth in section 541.118(a) of the regulations. You ask if payment on an hourly basis generally at straight-time rates for time worked in excess of 44 hours in a workweek would defeat the requirement that such an otherwise exempt employee is paid "on a salary basis."

Although employers are not required under the act to compensate bona fide exempt employees for overtime work, they may pay them for overtime if they wish. As you correctly pointed out in your letter, section 541.118(b) of the regulations indicates that additional compensation besides the required predetermined salary is not inconsistent with the salary basis of payment. Thus, the employer may pay for overtime work on an hourly basis, and this may be at straight time, at time and one-half, or some other multiple.

Your letter does not describe the type of work the exempt employees perform during their overtime hours. It should

be pointed out in this connection that the exemption will be defeated in any workweek in which the employee exceeds the percentage limitation on nonexempt work.

It should also be noted that where an employee's employment situation differs from that described in your letter, it will be necessary to consider his exemption status in the light of the facts and circumstances in his individual case.

Enclosed for your information are copies of Federal Register reprints concerning the effective date of the recently enacted increases in the minimum salary levels necessary for exemption as an executive, administrative, or professional employee.

If you have any additional questions in this or any other matter concerning the application of the Fair Labor Standards Act, you may find it more convenient to get in touch with our Regional Office at 907 U. S. Parcel Post Building, 341 Ninth Avenue, New York, New York 10001. That office will be pleased to offer every possible assistance.

Sincerely,

JOSEPH F. MCAULIFFE
Director
Division of Minimum Wage
and Hour Standards

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 91-0401 JGD

WILLIAM B. MORSCH,
Plaintiff,

v.

CITY OF LOS ANGELES,
Defendant.

ORDER DENYING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING THE PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

[Filed May 4, 1992]

On March 30, 1992, the defendant's motion for summary judgment, and plaintiffs' cross-motion for partial summary judgment came on for hearing. The Court has considered the papers filed, and the oral argument of counsel. The defendant's motion for summary judgment is DENIED; the plaintiff's cross-motion for partial summary judgment is GRANTED. This order is CERTIFIED for interlocutory appeal. The action is STAYED pending the outcome of the appeal.

Facts

On January 23, 1991, the plaintiffs filed their Complaint for Overtime Pay and Liquidated Damages Under the Fair Labor Standards Act ("Complaint"). The plaintiffs are, or within the three years prior to the filing of the Complaint, 88 fire protection employees of the City of Los Angeles, and bring this action on behalf of themselves and others similarly situated. The complaint alleges that the City violated the Fair Labor Standards

Act ("FLSA"), 29 U.S.C. § 201-219, as described below. There is no dispute between the parties on the essential facts.

During the period commencing August 15, 1986, until the present, the City employed plaintiffs and others similarly situated. The plaintiffs are Battalion Chiefs and Assistant Chiefs in the Los Angeles Fire Department whose primary duties involve the prevention of, preparation for, response to, and control of emergencies. Declaration of John C. Ware in Support of Plaintiffs' Cross-Motion for Partial Summary Judgment at 37.[1] The plaintiffs are not involved in the formation of department policy, and do not have the authority to hire or fire employees or make hiring or promotion recommendations. *Id.* The hours worked by the plaintiffs are controlled by the City. Plaintiffs may not absent themselves from work during the day without the permission of higher authority. Absence without excuse is subject to discipline. When plaintiffs are absent from work for a period of less than one day, such absences are deducted from accumulated leave or overtime in six minute increments. Plaintiffs must record on departmental time sheets all time spent on duty and all leaves of absence. Plaintiffs are compensated for overtime on a hourly basis, not on a time-and-one-half basis. *Id.* at 38. Plaintiffs may be suspended from duty without pay as a disciplinary measure.

The City is required to pay them time-and-one-half overtime compensation pursuant to 29 U.S.C. § 207(a) and (k) and regulations of the United States Department of Labor. The City has failed to do so.

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[1] This declaration is unsigned. Presumably, this was merely an oversight. Defendants have not objected.

Discussion

I. The Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. Rule 56(c). Whether a fact is material is determined by looking to the substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Facts are deemed "material" if a dispute over them "might affect the outcome of the suit under the governing law . . . ." *Id.*

The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *Id.* at 256. Rule 56(e) provides that "[w]hen a motion for summary judgment is made and supported as provided for in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. Rule 56(e).

As the Supreme Court explained in *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 477 U.S. 574 (1986):

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial."

477 U.S. at 586-87. A "genuine issue" of material fact exists only when the nonmoving party makes a sufficient showing to establish an essential element to that party's case, and on which that party would bear the burden of proof at trial. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23 (1986). The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson*, 477 U.S. at 255 (citing *Adickes v. S. H. Kress and Company*, 398 U.S. 144 (1970)).

Initially, it is the moving party's burden to establish that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *British Airways Board v. Boeing Co.*, 585 F. 2d 946, 951 (9th Cir. 1978); Schwarzer, Tashima & Wagstaffe, *Federal Civil Procedure Before Trial* § 14:123 [hereinafter Schwarzer]. "The moving party must show there are no triable issues of fact as to matters upon which it has the burden of proof at trial." Schwarzer at § 14:124. It is the opposing party's burden to show a triable issue of fact as to matters on which it will bear the burden of proof at trial, *id.* at § 14:131; further, "a complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); Schwarzer at § 14:131.

II. Genuine Issues of Material Fact

The moving party has the burden of showing the lack of any genuine issue of material fact. Some minor facts are disputed. But just because the parties do not agree on one version of the facts does not mean that a court cannot dispose of the matter on summary judgment. Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. Rule 56(c). *See also Anderson*, 477 U.S. at 257 ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be a genuine issue of material fact.") (emphasis omitted).

In this case, the defendant has made a motion for summary judgment, and the plaintiffs have made a motion for partial summary judgment. The parties agree that generally, there are no genuine issues of material fact pertaining to the issue of liability. The plaintiffs do object to the City's characterization of the plaintiffs as salaried employees. This concern, however, relates not to a factual dispute, but to legal interpretation. Thus, summary judgment is appropriate.

III. The FLSA and the Salary Basis Exemption

Generally, the FLSA bars the employment of any employee for a work week longer than 40 hours unless such employee receives compensation at a rate of one and one-half times his regular rate for those hours which exceed the 40 hour workweek. *See* 29 U.S.C. § 207(a)(1). However, any employee employed in a bona fide executive, administrative or professional capacity is exempt from the 40 hour workweek limitation. *See* 29 U.S.C. § 213(a)(1).

In order to qualify for this exemption the employee must be compensated on a "salary basis." 29 C.F.R. § 541.2. Compensation on a salary basis means that the employee receives a predetermined amount for each pay period, which amount is not subject to reduction because of variation in quantity or quality of the employee's work performance. 29 C.F.R. § 541.118. Subject to some exceptions not relevant here, the employee must receive his full salary for any week without regard to the number of days or hours worked. *Id.*

Plaintiffs do not dispute that they are employed in a bona fide, administrative or professional capacity. Thus, they would be exempt from the FLSA if they are compensated on a salary basis. The plaintiffs argue that they are not paid on a salary basis, and as developed below, this question is indeed the touchstone of the dispute.

IV. Fire Protection Partial Exemption: The § 207(k) Provision

29 U.S.C. § 207(k) created a partial exemption to the overtime requirements of the FLSA to accommodate the unique schedules of public safety employees such as firefighters. In lieu of the 40 hour work week approach, § 207(k) provides:

> No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities . . . if—
>
> > (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or
> >
> > (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of hours referred to in clause (B) of paragraph (1) bears to 28 days,

> compensation at a rate not less than one and one-half times the regular rate at which he is employed.

The City asserts that it "has applied the '7(k) partial exemption' to its sworn firefighters, and has adopted a 27-day work period for them." Defendant's Memorandum of Points and Authorities at 5. The City asserts that under this provision, time-and-one-half overtime is not required until 204 hours have been completed in the 27-day work period. Although 28/216 is a similar ratio to 27/204, a closer approximation is 27/208.

However, the amount of hours actually worked by the plaintiff firefighters in a 27-day period is 216. *See* Defendant's Memorandum of Points and Authorities at 20. The firefighters routinely work 4 to 12 hours of overtime per 27-day period, and are paid at their normal hourly rate. Therefore the plaintiffs do qualify for overtime pay under § 207(k).

V. Salary Basis and the Abshire Decision

A. Defining Salaried Status

The plaintiffs argue that they are not paid on a salary basis for the following reasons: (1) plaintiffs were required to maintain detailed accounts of their time; (2) they were compensated for overtime work on a hourly basis; (3) they were required to use compensable leave time; and (4) for less than one day's absence, they were docked accumulated leave or overtime in six minute increments.

The Department of Labor has recognized that certain privileges and benefits are attendant to the status of a salaried employee. In particular, payment on a salary basis carries with it the privilege that an employee has some latitude to vary his hours of work. The Department of Labor regulations describe a salaried employee as he who "receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or

part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a). But this docking test is only one aspect of the salary basis characterization. The Department of Labor regulations also provide that an employee is not paid on a salary basis if the employee is subject to disciplinary suspensions without pay for reasons other than infractions of safety rules of major significance. 29 C.F.R. § 541.118(a)(5). *See also* United States Department of Labor Opinion Letter No. 1614, January 15, 1986, CCH Labor Law Reports, para. 31,741 at 43,143.

Additionally, courts have held that employees are not paid on a salary basis when the employees' pay fluctuates from pay period to pay period in relation to the number of hours worked, *Hodgson v. Baker*, 544 F.2d 429, 434 (9th Cir. 1976), and when the employee accrues and uses sick leave and vacation benefits by the hour. *Knecht v. City of Redwood City*, 683 F.Supp. 1307, 1312 (N.D.Cal. 1987). An employer's requirement that employees work a fixed schedule and for a minimum number of hours is also inconsistent with salaried status. *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991).

The hours worked by plaintiffs are controlled by the City. Plaintiffs may not absent themselves from work during the day without the permission of higher authority. Absence without excuse is subject to discipline. When plaintiffs are absent from work for a period of less than one day, such absences are deducted from accumulated leave or overtime in six minute increments. Plaintiffs must record all time spent on duty and all leaves of absence on departmental time sheets. They are compensated for overtime on a hourly basis, not on a time-and-one-half basis. They may be suspended from duty without pay as a disciplinary measure. These characteristics are plainly inconsistent with salaried status.

B. Docking Pay and Abshire

In *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 785 (1991), the Ninth Circuit considered the issue of whether an employee whose compensation was subject to deduction for an absence of less than one day was considered as being paid on a salary basis for purposes of the FLSA. The court held that such an employee was not exempt from the FLSA. The exemptions to the FLSA are to be narrowly construed and employers who claim that an exemption applies to their employees must show that the employees fit " 'plainly and unmistakenly within [the exemption's] terms.' " *Abshire*, 908 F.2d at 486 (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960)). Clearly, the burden is on defendants to establish that the plaintiffs fall within the salaried basis exemption. *Id.* at 485.

The *Abshire* court held that employees whose pay is subject to deduction for absences of less than a day are not paid on a salary basis according to the regulations implementing the FLSA. The City admits that it is possible for the salary of the plaintiffs to be reduced by reason of an absence of less than one day if all available paid leave categories were exhausted. *See* Defendant's Motion at 24. Furthermore, the *Abshire* court noted that additional compensation for additional hours worked is generally not consistent with salaried status. 908 F.2d at 486. The City pays the plaintiffs straight overtime for additional hours worked.

Although the City has conceded that the employees' pay could theoretically have been subject to deduction for an absence of less than one day, the City contends that there is no evidence that such a deduction occurred.[2] The County of Kern in *Abshire* presented a similar argument that

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[2] Given that the statute of limitations for violations of the FLSA is two years, or three years if the violation is willful, there is potential liability dating back to as early January 23, 1989 or 1988. *See* 29 U.S.C. § 255(a).

there was no evidence of any employee having ever been docked for partial days missed. The court noted that this argument was irrelevant because the dispositive factor was whether the employee's pay was "subject to" deduction for absences of less than a day. 908 F.2d at 487. Similarly, here, the City's argument that there is no evidence of actual docking is irrelevant because the employees were subject to having their pay reduced for partial absences. The plaintiffs' motion for partial summary judgment is concerned with liability, not damages. The issue of whether plaintiffs' pay was subject to deduction goes to liability. The issue of whether there were actually any deductions goes to damages. The City's argument is directed at damages, and in the process the City has conceded liability under *Abshire*.

The City concedes that plaintiffs' pay was subject to deduction for a part-day absence. Thus, the City has not carried its burden of proof and is liable under § 207. Under *Abshire*, plaintiffs are entitled to summary judgment on the liability issue.

V. Department of Labor's Proposed Regulations

A. Relationship to Abshire

The City argues that recently promulgated proposed regulations from the Department of Labor overrule the result in *Abshire* for public employees. On September 6, 1991, the Department of Labor published an Interim Final Rule which provides that an otherwise exempt public sector employee would not be disqualified from exemption if the employee's compensation was subject to reduction for absences of less than one day. *See* 56 Fed. Reg. 45,826 (1991) (to be codified at 29 C.F.R. § 451.5d).

Furthermore, the Department of Labor issued another Interim Final Rule which provides that the exemption will not be lost if either (1) the public employer did not make a deduction for a part-day absence prior to September 6,

1991 or (2) the employer reimburses the employee for any deduction made prior to September 6, 1991. *See* 56 Fed. Red. 45,830 (1991) (to be codified at 29 C.F.R. § 541.118 (a) (6) (ii)).

Defendant has filed the Declaration of John Hardy, the Chief Administrative Analyst in the Employee Relations Division of the Office of the City Administrative Officer, in which Hardy states that he knows of no plaintiff in the *Morsch* class action whose pay was reduced for a part-day absence. Furthermore, he states that the City is committed to reimburse any deductions in the event such deductions are found to have occurred. *See* Declaration of John Hardy at paras. 44 and 45.

Thus, the question is whether the proposed regulations should override the *Abshire* decision. If the regulations were effective, the answer would be straightforward: the regulations would override *Abshire*. However, here we are dealing with proposed regulations that have yet to be formally enacted. Moreover, at least two district courts have recently held that the regulations are invalid.

B. Validity of the Regulations

In *Service Employees Int'l. v. County of San Diego*, 92 Daily Journal D.A.R. 2824 (S.D. Cal. Feb. 13, 1992), the court found that the regulation to be codified at § 451.5d was invalid because it was promulgated without a notice and comment period. *Id.* at 2830. Further, the court refused to stay its decision pending formal enactment of the proposed regulations, which is anticipated to occur in June 1992. The court noted that the County submitted no evidence to show that there were no deductions or that the County reimbursed plaintiffs for any deductions. *Id.*

On March 20, 1992, in *Alex v. California*, Eastern District of California, CV S-89-0032 LKK, Judge Lawrence Karlton issued an order discussing this issue and reached

the same conclusion: the Department of Labor's proposed regulations are invalid because they were promulgated without a notice and comment period. In fact, it appears that the regulations are invalid for our present purposes.

Under the "informal rulemaking" provisions of the Administrative Procedure Act, an agency must provide the public with notice and the opportunity to comment on the proposed rules. 5 U.S.C. § 553(b) & (c). After consideration of relevant comments, the agency may then adopt a final rule, along with a concise general statement of its basis and purpose. *Id.* § 553(c); *San Diego Air Sports Center, Inc. v. FAA*, 887 F.2d 966 (9th Cir. 1989). A substantive rule is invalid if the agency has failed to comply with the notice and comment procedures or if good cause has not been articulated or does not exist. *Linoz v. Heckler*, 800 F.2d 871, 878 (9th Cir. 1986).

In promulgating the Interim Rule, the Department of Labor determined that because "prior notice and comment are contrary to the public interest," good cause existed for dispensing with the notice and comment period. 56 Fed. Reg. 45,825. Exceptions to 5 U.S.C. § 553 are "narrowly construed and only reluctantly countenanced." *San Diego Air Sports*, 887 F.2d at 969. The good cause exception is "emergency procedure." *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982). The Department of Labor's effort to sidestep the notice and comment period is particularly egregious since the interests of thousands of employees were directly affected.

The *Service Employees Int'l. v. County of San Diego* and *Alex v. California* cases have correctly analyzed the validity of the Interim Rule. This Court considers the regulation invalid.

C. Impact of the Regulations

Even if this Court were to consider the regulations, the impact on the analysis is narrow. The Interim Rule limits itself to situations where the plaintiff is "other-

wise exempt." The docking of pay is not the only characteristic of a salary basis. As discussed above, other characteristics can also indicate a salary basis. In this case, the plaintiffs were paid overtime, and had little control over their schedule. These and other characteristics suggest that the plaintiffs were not salaried employees.

The City has not met its *Abshire* burden of proof of establishing that the plaintiffs are salaried employees. The plaintiffs are nonsalaried employees, and the City must pay them time-and-one-half overtime compensation.

VI. Interlocutory Appeal

28 U.S.C. § 1292(b) (emphasis omitted) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after entry of the order: Provided however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Defendant argues that the *Abshire* decision is contrary to the intent of Congress in the sense that Congress surely did not intend that almost every public employee be compensated time-and-one-half for overtime. This position is debatable, but supported to a degree by the Labor Department's attempt to interpret the FLSA. As noted above, this issue has become a focus for other litigation as well as the present case. This Court is of the opin-

ion that the order granting the plaintiffs' cross-motion for partial summary judgment involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of this litigation. Therefore, the order is CERTIFIED for appeal.

Conclusion

For the reasons discussed above, the defendant's motion for summary judgment is HEREBY DENIED. The plaintiff's motion for partial summary judgment is HEREBY GRANTED. The order is CERTIFIED for interlocutory appeal. The action is STAYED pending the appeal.

IT IS SO ORDERED.

Dated: May 4, 1992

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

Supreme Court, U.S.
FILED
JUL 6 1992
OFFICE OF THE CLERK

(3)

No. 91-1748

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MALCOLM PIRNIE, INC.,
Petitioner,
v.
LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICUS CURIAE [1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 200,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional organizations in the United States.

A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing *amicus curiae* briefs in a wide spectrum of important labor relations litigation before this Court.[2]

This case raises important issues regarding the U.S. Department of Labor's ("DOL") "salary basis" test which is used to determine whether executive, administrative, and professional employees are exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. §§ 201, *et seq.* The precise question presented is whether current DOL Interpretive Regulations, issued pursuant to Section 13(a)(1) of the FLSA, 29 U.S.C. § 213(a)(1), should be construed to prevent an employer from correcting a minor and technical deviation from the DOL's salary requirements.

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.2. Letters of consent are on file with the Clerk of Court.

[2] E.g., *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972).

So construed, an employer would be required to pay large amounts of "overtime" to highly-paid executive, administrative, and professional employees who would otherwise be exempt from the Act's coverage. The question arises from the Second Circuit's contorted reading of the so-called "window of correction" that appears in DOL's salary regulations, and which on its face allows the correction to be made.

This question is of vital concern to the Chamber and its members, many of whom employ large numbers of salaried individuals who are highly paid and regularly perform the duties of executive, administrative, and professional employees. If the Second Circuit's restrictive view of the pertinent DOL regulatory scheme is allowed to prevail, then significant numbers of executive, administrative, and professional employees who otherwise would be considered exempt from the overtime provisions of the FLSA will be entitled to enormous sums of unpaid overtime. The Chamber and its members, therefore, are concerned that the policies and purposes of the Act not be undermined, and that private sector pay systems not be thrown into disarray by an erroneous interpretation of DOL's regulatory scheme, which itself is of questionable validity.

SUMMARY OF THE CASE

A. Section 13(a) of the Fair Labor Standards Act of 1938 provides an exemption from the Act's minimum wage and overtime requirements for "any employee employed in a bona fide executive, administrative, or professional capacity . . . as such terms are defined and delimited from time-to-time by regulations of the Secretary [of Labor]." 29 U.S.C. § 213(a)(1) (1988). The Department of Labor's current Regulations, issued pursuant to Section 13(a), require that executive, administrative, and professional employees not only satisfy specified "duty" requirements in order to be exempt from the Act's coverage, but also require that they be paid on a "salary or fee basis." 29 C.F.R. §§ 541.1-3 (1991). The Regulations further state, in § 541.118(a), that "[a]n

employee will be considered to be paid 'on a salary basis' . . . if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount . . . which amount is not subject to reduction because of variations in the quality or quantity of work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked."

Five such "exceptions" are then set forth in the Regulations, two of which are particularly pertinent here. The first, in § 541.118(a)(2), allows deductions to be made from the pay of salaried employees for personal absences from work of a day or more. The second pertinent exception, in § 541.118(a)(6), and frequently referred to as the "window of correction," states:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available. it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

It is the Second Circuit's restricted reading of the "window of correction" in § 541.118(a)(6) that is directly in issue in this case.

B. Petitioner Malcolm Pirnie is an engineering consulting firm that employs more than 900 employees throughout the United States. Malcolm Pirnie performs a majority of its work for government contractors. Approximately 400 engineers, architects, scientists, supervisors, accountants, and administrators work for Malcolm Pirnie. They are placed in Salary Grades 6-9 of an 11

grade salary system, and are paid salaries of between $30,000 and $70,000 per year. Employees receive a fixed salary every two weeks. Although Malcolm Pirnie considers employees in Grades 6-9 to be exempt, employees in Grades 6-8 are paid time and one-quarter, and employees in Grade 9 are paid straight time, for all hours worked in excess of 40 hours per week.

Until 1988, Malcolm Pirnie issued a handbook to all employees that stated that deductions from pay would be made for absences in amounts of less than a day. Although the handbook ostensibly applied to all employees, the district court concluded that the policy was never intended to apply to employees in Grades 6-9, and that it was not Malcolm Pirnie's policy to make such deductions for exempt employees. *Dole v. Malcolm Pirnie, Inc.*, 758 F. Supp. 899, 908 (S.D.N.Y. 1991). Notwithstanding its policy, Malcolm Pirnie discovered that 24 employees out of the 376 employees in Grades 6-9, over an eighteen month period, had recorded absences without leave for periods of less than a day for which a total of $3,269 had been deducted from their salaries. Malcolm Pirnie reimbursed the 24 individuals for the deductions, and clarified the company's policy regarding part-day deductions by amending the language of its handbook and by specifically instructing employees in Grades 6-9 to charge part-day absences to a new account entitled "Paid Absence."

C. After an investigation of Malcolm Pirnie's pay practices by DOL, the Secretary of Labor instituted a lawsuit in May, 1989 in which she alleged that all Malcolm Pirnie's employees in Grades 6-9 were not exempt because their salaries were subject to part-day deductions. Malcolm Pirnie denied the allegation, claiming that its employees in Grades 6-9 were exempt executive, administrative, and professional employees within the meaning of § 13(a) of the Act and §§ 541.1-3 of the DOL regulations.

The district court granted Malcolm Pirnie's motion for summary judgment, rejecting the Secretary's contention

that the overtime exemption of the FLSA had been lost because part-day deductions had been made from the salaries of the 24 otherwise exempt employees. Although the district court impermissibly read the "window of correction" as requiring that deductions be "inadvertent" *and* for "reasons other than lack of work," the court nevertheless concluded that Malcolm Pirnie's reimbursement of the employees and its clarification of company policy satisfied the essential requirements of 29 C.F.R. § 541.118(a)(6). *Dole v. Malcolm Pirnie, Inc.*, 758 F. Supp. 899, 905-908 (S.D.N.Y. 1991).

The Second Circuit reversed the district court, holding that all of Malcolm Pirnie's executive, administrative, and professional employees in Salary Grades 6-9 were not paid on a "salary basis" because deductions from pay for lost time were made in increments of less than a day from the salaries of the 24 employees. The Court refused to allow Malcolm Pirnie to take advantage of § 541.118(a)(6)'s "window of correction" because, in the Court's view, the deductions that were made were not "inadvertent," and because other employees who did not have deductions made nevertheless were "subject to" impermissible deductions. Without mention of the language of the "window of correction" that permits the reimbursement of deductions "made for reasons other than lack of work," the Second Circuit effectively closed the "window" altogether by requiring that impermissible deductions be not only "inadvertent," but also "one-time or unintentional." *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 616-617 (2d Cir. 1991).

As a result of the Second Circuit's decision, Malcolm Pirnie must pay otherwise exempt employees $500,000 for overtime work.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

In support of its Petition, Malcolm Pirnie has shown that the Second Circuit misconstrued the "window of correction" contained in § 541.118(a)(6) and that the

Second Circuit's opinion conflicts with the views of the Fourth Circuit. Although we do not reiterate Petitioner's arguments here, we do present additional support for Petitioner's contention that the Second Circuit misconstrued the "window of correction," and we set forth other compelling reasons why the Petition should be granted. First, however, in order to set forth the Second Circuit's erroneous decision in its true perspective, we detail the uneven and enigmatic administrative history accorded the term "salary basis" by the DOL.

I. THE DOL'S INTERPRETATION OF THE TERM "SALARY BASIS" HAS BEEN NEITHER CONSISTENT NOR EXPLAINED.

DOL has accorded the term "salary basis" inconsistent and unexplained meanings since shortly after the FLSA was enacted in 1938. In 1940, the Administrator of the Department of Labor's Wage and Hour Division ("the Administrator") issued the first Regulations pursuant to the Secretary's empowerment under Section 13(a) of the Act, stating that to qualify for the exemption, executive employees, among other requirements, had to be "compensated for [their] services on a salary basis at not less than $30 per week;" and that professional and administrative employees, among other requirements, had to be "compensated for [their] services on a salary or fee basis at a rate not less than $200 per month." The Regulations were silent, however, as to the meaning of the phrase "compensated on a salary basis." 5 Fed. Reg. 4077 (Oct. 15, 1940), *codified at* 29 C.F.R. §§ 541.1(e), 541.2(a), and 541.3(b) (Supp. 1940 revision).

Subsequent pronouncements by the Department of Labor as to the meaning of the "salary basis" phrase have been less than elucidative. In 1944, the Wage and Hour and Public Contracts Divisions announced that:

> since it is well recognized that bona fide executive, administrative and professional employees are normally allowed some latitude with respect to the time spent at work, an employee will not be regarded as being paid on a salary basis if deductions are made

> for those types of absences ordinarily allowed such employees. For example, an employee is not being paid on a salary basis, if the employer makes deductions from his salary for an afternoon *when he goes home early or when he occasionally takes a day off*, unless, under the circumstances of a particular case, such absences must be considered unreasonable (emphasis added).

Release A-9, August 24, 1944, "Payments on 'Salary Basis' for Executive, Administrative and Professional Employees Clarified," 1944-1945 WH Man (BNA) 719. From this it is clear that as early as 1944 the Department of Labor did not differentiate between docking the salaries of executive, administrative or professional employees for absences of part of a day and docking their salaries for absences of an entire day. Both actions were impermissible.[3]

In December 1949, following a rule-making proceeding,[4] the Administrator issued two documents which amended and interpreted the DOL Regulations pertaining to Section 13(a)(1) of the Act. The first document revised the Regulations previously issued, designated the revised Regulations as "Subpart A—General Regulations," and, *inter alia*, raised the minimum amounts of compensa-

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[3] Inconsistently, in 1945, in response to an inquiry, the DOL Wage and Hour Division stated that the salary requirements of the executive and administrative exemptions were satisfied where salary deductions were taken for each day or a part of a day that employees were absent, provided that the deductions did not reduce the employees' earnings below the minimum salary requirements of the applicable exemption. 1944-1945 WH Man. (BNA), 727.

[4] A Notice of Hearing concerning, *inter alia*, "the need for revision or definition" of the Regulatory terms "salary basis" and "salary and fee basis" was published in the Federal Register on October 22, 1947. 12 Fed. Reg. 6896, (1947). Subsequently, after a hearing had been held and a hearing Report had issued, the Administrator published in the Federal Register a Notice of Proposed Revised Regulations. 14 Fed. Reg. 5573 (Sept. 10, 1949). Then the Administrator issued the documents described in the above text.

tion that had to be paid ("on a salary basis," or "on a salary or fee basis") to exempt executive, administrative, and professional employees. 14 Fed. Reg. 7705, 7707 (Dec. 24, 1949), *codified at* 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e) (1950 revision). The second document contained a new "Subpart B—Interpretations" which set forth "statements of general policy and interpretations directly related to" Subpart A's General Regulations. 14 Fed. Reg. 7730 (Dec. 28, 1949), *codified at* 29 C.F.R. §§ 541.100-541.600 (1950 revision). One such interpretation, in § 541.118(a), provided:

> An employee will be considered to be paid on a salary basis within the meaning of the regulations in Subpart A of this part, if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the number of hours worked in the workweek or in the quality or quantity of the work performed. The employee must receive his full salary for any week in which he performs any work *without regard to the number of days or hours* worked.

Id. at 7735 (1949), *codified* at 29 C.F.R. §§ 541.100-541.600 (1950 revision) (emphasis added). Thus, in 1949, the Administrator adhered to the 1944 interpretation, making it impermissible to dock weekly salaries for absences of any duration—*i.e.*, whether for part of a day or for an entire day.

The latter remained the official DOL interpretation of the term "salary basis" until 1954. On March 9 of that year, a Notice in the Federal Register announced that the Administrator "propose[d]" to amend the DOL's "salary basis" interpretation (29 C.F.R. § 541.118(a)) in a number of respects. The Notice set forth the text of the proposed amendments, gave interested persons 30 days in which to submit written statements regarding the proposals, but set forth nothing whatever explaining the proposed amendments or describing the reasons, or reas-

oning, supporting them. 19 Fed. Reg. 1321. Then, on July 17, 1954, the Administrator announced the adoption, verbatim, of all such proposed interpretative amendments except for one provision not pertinent here. 19 Fed. Reg. 4405 (1954), *codified at* 29 C.F.R. § 541.118(a) (1955). But, again, the Administrator provided no explanation for the changes or the reasons, or reasoning, supporting them. The amended interpretative Regulation, 29 C.F.R. § 541.118(a) (1955), has not been changed since 1954 and is the administrative regulation involved in this case.

The 1954 interpretative amendments continued the requirement of § 541.118(a) that an employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked, but made the requirement subject to a number of specific exceptions. One such exception is the "window of correction" (29 C.F.R. § 541.118(a)(6) (1991)), the text of which is reproduced *supra*, p. 3. Another of the exceptions, that set forth in § 541.118(a)(2) and referred to *supra*, p. 3, states in full:

> Deductions may be made . . . when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

Thus, under the presently applicable interpretation, the statutory exemption is not forfeited by an employee who is absent from work for personal reasons during an entire day of 8 hours, but the exemption is forfeited by an employee who, for the same reasons, is absent for any period less than 8 hours, say, 7 or 7½ hours. On its face, this distinction, if not clearly discriminatory, makes little sense. Moreover this regulatory distinction was prescribed by the Administrator without an explanatory statement of any sort, and it followed a period of

some 16 years in which a contrary interpretation was, for the most part,[5] controlling.

In view of its administrative history, the DOL's present "salary basis" test would, if subjected to judicial review under the Administrative Procedure Act's "arbitrary and capricious" standard (5 U.S.C. § 706(2)(A) (1988)), almost certainly be found defective. This is so because the DOL has set forth neither findings, nor analysis, nor explanation to justify the about-face encompassed by the 1954 regulatory change distinguishing between full-day and partial-day absences.[6]

With respect to the petition before the Court, it is highly significant that there is nothing in the administrative history of the DOL Regulations that indicates that the "window of correction" should be read in any way other than as written. The Second Circuit's strained reading of the provision is all the more egregious, therefore, not only because it lacks support in the administrative history, but also because it results in the upholding of a salary requirement which, as shown by the administrative history, is itself of dubious validity.

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[5] *See* note 3, *supra*.

[6] Under the Administrative Procedure Act's "arbitrary and capricious" standard, it is well-settled that "an agency must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Assoc. of the United States, Inc. v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 41, 48 (1983); *Bowen v. American Hospital Association*, 476 U.S. 610, 626-627 (1986); *Federal Communications Comm'n v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 802-803 (1978); *Natural Resources Defense Council v. Environmental Protection Agency*, 824 F.2d 1258, 1282, 1293 (1st Cir. 1987). The requirement is especially important where an agency "choos[es] to alter its administrative course." *Action for Children's Television v. F.C.C.*, 821 F.2d 741, 745 (D.C. Cir. 1987).

II. THE SECOND CIRCUIT MISREAD THE PLAIN LANGUAGE OF § 541.118(a) AND UNDULY RESTRICTED APPLICATION OF THE WINDOW OF CORRECTION.

The Second Circuit misread the plain language of § 541.118(a)(6) in two respects. First, the court concluded that the "window of correction" only allows reimbursement of inadvertent, one-time or unintentional deductions. 949 F.2d at 616. Secondly, the court failed to address, or apparently even to consider, the second half of the "window" that allows reimbursement of deductions "made for reasons other than lack of work." 29 C.F.R. § 541.118(a)(6).

The language of the "window" is straightforward. An employer may preserve the exemption by reimbursing employees for impermissible deductions that were inadvertent, *or* that were "made for reasons other than lack of work." Although the precise meaning of the term "made for reasons other than lack of work" is not at first apparent, the clause should be read in the context of the entire Section. Read in that light, the meaning of the phrase becomes clear. Subsection (4) of § 541.118(a) explicitly, and subsections (2), (3), and (5) by implication, refer to impermissible deductions from an employee's salary.[7] The deductions thus prohibited consti-

[7] In pertinent part, § 541.118 states:

(a) * * *

(1) * * *

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. . . .

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary

tute deductions for "reasons other than lack of work," and therefore the "window" permits reimbursement of all such deductions. Accordingly, an employer who makes the required reimbursement, and who also promises to discontinue making impermissible deductions in the future, satisfies the "salary basis" test, and preserves the overtime exemption.

DOL has asserted that such a reading of the "window" is too broad, and that it provides latitude for an employer to abuse the salary requirements of § 541.118(a). *See Dole v. Malcolm Pirnie, supra,* 758 F. Supp. at 904. DOL, however, is responsible for having drafted the Section's language, and therefore, the language should be given its plain and ordinary meaning. If DOL did not intend the language to be read as written, then the language should be withdrawn and revised. Critically, the failure of the Second Circuit to read the language as written erroneously precluded Malcolm Pirnie from correcting deductions clearly encompassed within the language of § 541.118(a)'s "window of correction."

III. DOL HAS APPLIED ITS SALARY BASIS TEST INCONSISTENTLY BETWEEN PUBLIC AND PRIVATE EMPLOYERS.

The degree of error in the Second Circuit's reading of the "window of correction" is heightened by the fact that DOL applies the "salary basis rule" and "window" differently to private employers than to public employers. Since January 1987, eight months after the FLSA became applicable to public employers, DOL has allowed public

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military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

employers to make part-day deductions from the salaries of otherwise exempt employees, notwithstanding the requirements of § 541.118(a). Moreover, DOL has provided little or no explanation for this disparate application of the "salary basis" rule, and has cited no evidence to support its position that private sector pay systems are different from public sector pay systems.

In 1974, Congress extended coverage of the FLSA to public employers for the stated purpose of ensuring consistency in the application of the minimum wage and overtime laws between private and public employers. H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. at 28 (1974), *reprinted* in 1974 U.S.C.C.A.N. 2811, 2837. Subsequently, after some eleven years in which the extension was not enforced,[8] Congress, in 1985, further amended the FLSA to provide: "No state . . . shall be liable under Section 16 of the Fair Labor Standards Act of 1938 for a violation of such Act occurring before April 15, 1986. . . ." Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 2(c), 99 Stat. 788 (1985). The purpose of the amendment delaying application of the FLSA to the states was set forth in the Senate Report:

> The Committee has deferred application of the FLSA overtime provisions until exactly one year after the mandate in *Garcia* so that state and local governments may make necessary adjustments in their work practices, staffing patterns, and fiscal priorities.

S. Rep. No. 99-159 at 15, 99th Cong., 1st Sess. 2 (1985), *reprinted in* 1985 U.S.C.C.A.N. 651, 663. Significantly

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[8] In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court held that Congress had exceeded its authority in extending the FLSA to the states. *National League of Cities* was overruled, however, in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Congress' 1985 amendments to the FLSA were in response to the Court's decision in *Garcia*, and were designed to delay the impact of the decision. *See* text, this page. *See also Blanton v. City of Murfreesboro*, 856 F.2d 731 (6th Cir. 1988) (discussing post-*Garcia* amendments to FLSA); *Rhinebarger v. Orr*, 839 F.2d 387 (7th Cir. 1988), *cert. denied*, 488 U.S. 824 (1989) (same).

here, when the 1985 Amendment was under consideration, Congress reiterated its 1974 goal of providing consistency between private sector and public sector wage requirements. *Id.*

In January 1987, after numerous suits were brought by public employees for unpaid overtime, the Secretary of Labor adopted a new enforcement policy regarding the "salary basis" requirements of public employers under §§ 541.1-3. Thenceforth, DOL would not enforce the docking prohibitions of § 541.118(a) against public employers if the public employer in question was required by law to pay employees only for time worked.[9] DOL Field Operations Handbook, Chp. 59d (1989). DOL did not explain, however, how its new enforcement policy affecting public employers was compatible with its published "salary basis" requirement, or why a similar enforcement policy should not be made applicable to private employers.

Then, in the fall of 1991, DOL did a complete turnabout in its interpretation of the salary rule for public employers. On September 6, 1991, the Secretary promulgated a new Interim Final Rule which preserves the salaried status of public employees who otherwise satisfy

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[9] This policy did not affect the right of individuals employed by public employers who had been docked for part-day absences to bring their own actions under § 16(b) of the FLSA. 29 U.S.C. § 216(b) (1988). Certain courts, however have denied the overtime claims. For example: *Keller v. City of Columbus, Ind.*, 778 F. Supp. 1480 (S.D. Ind. 1991); *Hartman v. Arlington County, Va.*, 720 F. Supp. 1227, 1232 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990); *International Assoc. of Fire Fighters, Local 2141 v. City of Alexandria, Va.*, 720 F. Supp. 1230 (E.D. Va. 1989), *aff'd.*, 912 F.2d 463 (1990); *Sarver v. Roanoke*, 29 Wage & Hour Cas. (BNA) 1442, 1444 (W.D. Va. 1989); *Harris v. District of Columbia*, 709 F. Supp. 238, 241 (D.D.C. 1989); *District of Columbia Nurses Assn. v. District of Columbia*, 29 Wage & Hour Cas. (BNA) 868, 869 (D.D.C. 1988). Other courts have awarded overtime pay. *Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 785 (1991); *Service Employees Int'l Union, Local 102 v. County of San Diego*, 784 F. Supp. 1505, 1511-1512 (S.D. Cal. 1992); *Knecht v. City of Redwood City*, 683 F. Supp. 1307, 1311 (N.D. Cal. 1987).

the requirements of § 541.118(a), even if their employers have a policy of making pay deductions for absences of *less* than one day. 56 Fed. Reg.. 45824 (Sept. 6, 1991).[10] In addition, on the same day, the Secretary proposed a new, less restrictive "window of correction" for the benefit of public sector employers only. 56 Fed. Reg. 45828 (Sept. 6, 1991). Under the proposal, there would be no requirement that part-day deductions from the pay of public employees be "inadvertent" or "made for reasons other than lack of work."[11] The only limitation in the

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[10] The Interim Final Rule appears as an addition to 29 C.F.R. § 541 and states (56 Fed. Reg. at 45826):

> § 541.5d Special Provisions Applicable to Public Sector Employers (Federal, State and Local Governments)
>
> (a) A Federal, State or local government employee ("public employee") who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.1, 541.2, or 541.3 of this part on the basis that such employee is paid according to a pay system established by statute, ordinance, regulation or public policy under which the employee accrues personal leave and sick leave and, absent the use of such accrued leave (because the leave has been exhausted or by the employee's choice), requires the public employee's pay to be reduced ("leave without pay") for absences, for personal reasons or because of illness or injury, of less than one work-day.
>
> (b) Deductions from a public employee's pay that are not regular and recurring for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" except in the workweek in which such deductions occurred.

[11] The proposed regulatory change would renumber § 541.118 (a)(6) as (a)(6)(i) and add a new paragraph 541.118(a)(6)(ii) to read as follows (56 Fed. Reg. at 45830):

> § 541.118 Salary Basis
>
> (a) * * *
>
> (6) * * *
>
> (ii) If a Federal, State or local government (i.e., public sector) employer's pay system is as described in § 541.5d, and either:
>
> (A) The public employer has made no actual deductions from the pay of otherwise-exempt public employees for absences, for personal reasons or because of illness or injury, of

proposal is that deductions would have to have been reimbursed prior to September 6, 1991.[12]

In explaining its proposed changes, DOL stated conclusorily that "public pay systems must be analyzed differently from, because they are significantly distinguishable from, private sector pay systems." 56 Fed. Reg. at 45829. DOL did not comment on the regulatory consistency between the private and public sectors which the Congress was seeking in 1974, and again in 1985, by extending FLSA coverage to public sector employees. Nor did DOL explain why the interests it sought to protect in public sector pay systems—accountability for monies spent, time paid for time worked—are in fact different from the interests which private employers seek to protect in their pay systems.

The irrationality of DOL's salary docking prohibition for private employers in § 541.118(a) is made plain by its proposed Interim Final Rule for public employers. An

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less than one work-day before the effective date of § 541.5d (i.e., September 6, 1991); or

(B) The employer reimburses any otherwise exempt public employees for deductions from salary that were made for absences, for personal reasons or because of illness or injury, of less than one work-day occurring before the effective date of § 541.5d (i.e., September 6, 1991);

then eligibility for exemption for public employees who otherwise meet the requirements of § 541.118 and who were subject to pay system will not be defeated for failure to pay "on a salary basis."

[12] Although the comment period with respect to the proposed new rule for public sector employees ended on October 7, 1991, DOL has made no further pronouncement about it. Further, the rule has been cast in doubt by a district court which held that DOL did not comply with the notice and comment requirements of the Administrative Procedure Act ("APA"). *Service Employees Int'l Union, Local 102 v. County of San Diego*, 784 F. Supp. 1503, 1512 (S.D. Cal. 1992). Whether or not the district court is correct regarding its APA concerns, it is interesting to note that the court was skeptical of DOL's treatment of the overtime issue in its proposed rule in light of Congress' extensive consideration of the public employer matter in 1985.

employee's salary status should not turn on the mere identity of his employer. In the instant case, where Malcolm Pirnie performs the majority of its work for public entities, its interests in fashioning a pay system based on accountability and compensation for time worked are identical to those of the public employers for whom it performs services.

IV. THE SECOND CIRCUIT'S DECISION UNDERMINES MANY PRIVATE SECTOR PAY SYSTEMS AND DISCOURAGES THE APPLICATION OF OBJECTIVE PAY STANDARDS.

The Second Circuit's unduly restrictive reading of the "window of correction" widens the impact of regulatory prohibitions that are inconsistent with pay systems utilized by many large employers in the United States. As noted above, private employers have the same interests in accountability and in compensation for time worked as public employers. In particular, employers that do business with federal, state and local governments usually must satisfy the same accounting standards as the public entities themselves. Accordingly, many such employers have adopted pay systems that are compatible with governmental systems and which allow them to qualify for public work, but which, arguably, would be invalid under the Second Circuit's decision.

The Second Circuit's decision also beclouds many pay practices followed by United States employers. Some employers require their salaried executive, administrative and professional employees to take deductions from special leave accounts for employee absences of less than a day, even though the individual's pay remains intact. The Ninth Circuit has suggested that such a practice fails to satisfy the requirements of § 541.118(a). *Abshire v. County of Kern*, 908 F.2d 483, 487 n.3 (9th Cir. 1990). *Accord: Service Employees Int'l Union, Local 102 v. City of San Diego*, 784 F. Supp. 1503, 1510 (S.D. Cal. 1992). *Cf. York v. City of Wichita Falls*, 944 F.2d 236, 242 (5th Cir. 1991); Administrative Letter Rulings:

U.S. Department of Labor, Wage & Hour Division, July 17, 1987.

Other employers have a practice of making a pay deduction for increments of less than a day if the absence is in connection with a full day's absence. For example, if an employee is absent for one and a half days, and the employee has utilized all of his leave, a deduction is made from pay in the amount of one and one-half days. Employees of some employers receive vacations in one-half week increments. If an employee who is entitled to a vacation of two and one-half weeks, or 17½ days, decides to take a full 18 days, then a reduction in pay for the additional half day absence usually is made. In such a circumstance, DOL would take the position—presumably endorsed by the Second Circuit—that all employees who are subject to such a deduction would lose their exemption for failing to satisfy the salary requirement.

It also is not uncommon for employers to make salary deductions for part day absences by otherwise exempt employees who are in their first six months of employment and who have not yet accrued leave benefits. Again, under the Second Circuit's holding in this case, such employees would no longer be deemed exempt.

The Second Circuit's restrictive reading of the salary requirements in § 541.118(a) also forecloses the utilization of objective pay practices by private sector employers. A private sector employer who, in the interest of equal treatment of all employees, adopts an objective, uniform policy requiring that all employees account for absences of less than a day runs the risk that his executive, administrative, and professional employees will lose their exemptions under the Act. It does not matter if the employer adopts the policy because he is required to do so as a government contractor, or if the employer does so as a sound business practice. The result is the same—salaried employees would lose their exemption and payment for overtime would be compelled.

Further, if an employer believes that a salaried employee has abused an existing privilege of not being docked for partial day absences, the employer, under the Second Circuit's decision, could not provide an incentive for improved performance by instituting a docking policy. Rather, the employer would be required to tolerate the lost time or terminate the employee outright. In addition, the inability to promulgate a uniform pay practice which allows for such partial day deductions inevitably results in supervisors and managers of the same employer applying varying standards of tolerance with regard to such absences. One supervisor may take a fairly relaxed view, not wanting to subject employees to potential discharge for excessive part day absences for which they were paid; another supervisor may take a stricter view, and insist on discipline after a single half-day absence.

No responsible employer can tolerate such subjective, and potentially discriminatory, practices. In different contexts many employers who have relied on *ad hoc*, subjective employee selection procedures have ended-up shouldering a substantial burden in subsequent litigation when required to justify or explain their employment decisions. *See*, for example, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (particular selection criteria having disparate impact on protected group constitutes discrimination under Title VII unless justified by business necessity); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (subjective promotion criteria actionable under Title VII); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (subjective promotion criteria actionable under Title VII because of discriminatory impact); *Harris v. Birmingham Bd. of Educ.*, 712 F.2d 1377, 1383 (11th Cir. 1983) (en banc) (lack of objective hiring criteria a basis of establishing *prima facie* case under Title VII); *Watson v. National Linen Service*, 686 F.2d 877, 881 (11th Cir. 1982) (lack of fixed or reasonably objective hiring standards discriminatory under Title VII); *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1375 (5th Cir. 1978) (same as *Watson* in context

of supervisors' promotion decisions); *Pugh v. See's Candies, Inc.*, 250 Cal. Rptr. 195, 212 (Cal. Ct. App. 1988) (under covenant of good faith and fair dealing in employment contract, subjective criteria unavailable to employer regarding termination decision).

Ironically, therefore, the Second Circuit's efforts to preserve the docking prohibitions contained in § 514.118(a) by restricting the scope of the "window of correction" will discourage the adoption of uniform, objective pay systems by responsible employers who foster sound business practices. As such, the Second Circuit's decision is incompatible with fundamental principles of employment law, and with the policies and purposes of the FLSA.

CONCLUSION

For the foregoing reasons, the Chamber urges the Court to grant Petitioner's Writ of Certiorari to the Second Circuit.

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No. 91-1748

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MALCOLM PIRNIE, INC.,
Petitioner,

v.

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE NATIONAL SECURITY INDUSTRIAL ASSOCIATION IN SUPPORT OF THE PETITIONER

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BRIEF AMICUS CURIAE OF THE NATIONAL SECURITY INDUSTRIAL ASSOCIATION IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST

With the consent of the parties,[1] the National Security Industrial Association ("NSIA") respectfully submits this brief *amicus curiae* in support of the petition of Malcolm Pirnie, Inc. ("Malcolm Pirnie").

NSIA is a national organization of some 400 manufacturing, research, and service companies from all segments of industry that provide goods and services in

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[1] The appropriate consent letters have been filed with the Clerk of the Court.

support of the United States' national security needs. NSIA's membership includes most of the American manufacturing companies on the Department of Defense's annual list of contractors that receive the largest volume of awards. In addition, NSIA's membership includes many small- and medium-sized companies that provide goods and services to the federal Government. One of NSIA's most important functions is the presentation of the views of its members on issues of Government regulation.

The case at bar has the potential to affect virtually every member of NSIA. Many of the contracts awarded by the federal Government are cost-reimbursement or price-redeterminable contracts. Regulations provide that under a cost-reimbursement contract, a contractor may be reimbursed only those costs that are both allowable and properly allocable to the contract. 48 C.F.R. § 52.216-7 (1991). Similarly, regulations provide that under a price-redeterminable contract, price will be redetermined only on the basis of allowable costs properly allocated to the contract. 48 C.F.R. § 52.216-16 (1991). The determination of what costs are allowable and to which contract(s) they are allocated is based principally on the cost principles set forth in the federal acquisition regulations, 48 C.F.R. §§ 31.000-31.205-52 (1991), and on the Government's Cost Accounting Standards, 48 C.F.R. §§ 30.000-30.603 (1991). Other requirements may result from conditions imposed by Government auditors, such as the Defense Contract Audit Agency ("DCAA").

These and other applicable regulations require federal contractors to maintain accurate and detailed time records.[2] In general, federal contractors must ensure that

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[2] This requirement often applies even when a contractor performs under a fixed price contract. Contractors are required to maintain detailed records of employee time charging for purposes of confirming entitlement to progress payments on the basis of costs incurred and for the purpose of complying with the Truth in Negotiations Act, 10 U.S.C. § 2306a.

their employees record time actually worked on specific projects each day. Failure to follow proper procedures can lead to civil and criminal sanctions. *E.g.*, *United States v. Systems Architects, Inc.*, 757 F.2d 373, 376 (1st Cir.), *cert. denied*, 474 U.S. 874 (1985) (contractor convicted of fraud for, among other actions, improperly shifting labor costs allocable to specific contracts to overhead accounts).

The importance the Government places on maintaining detailed and accurate time records is evident from the DCAA's Guidelines for a Comprehensive Audit of Labor Costs, Pub. No. 7641.88 (1984). The introduction to this manual states that "[t]he cost of labor at many contractor locations is the most sensitive cost element that DCAA is required to audit" and "the accurate recording of labor costs by contractor employees [is] of utmost importance." *Id.* at 1.

In light of the demand that contractors maintain detailed time records so that the Government will be charged only for time worked, the decision of the U.S. Court of Appeals for the Second Circuit in *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), poses special problems for contractors. In holding that otherwise exempt employees could be entitled to overtime compensation under the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. § 201 *et seq.*, if they were subject to a policy that might reduce their compensation for fractions of days missed from work. the court of appeals indicated that no actual reduction in pay need have occurred for the exemption to be lost. Thus, the court stated that "an employee who *can* be docked pay for missing a fraction of a workday must be considered an hourly, rather than a salaried, employee." *Malcolm Pirnie*, 949 F.2d at 615 (emphasis added). A contractor's requirement that its employees account for each hour, or fraction thereof, of the workday readily lends itself to misinterpretation as a policy whereby employees, including salaried employees,

can have their pay reduced for not working a full day. To ensure that contractors are not embroiled in needless litigation, salaried employees should not lose their exempt status unless their pay actually has been improperly reduced.

Furthermore, the Second Circuit's decision was predicated on an unreasonable and excessively narrow interpretation of a Department of Labor regulation that allows an employer, in appropriate circumstances, to avoid the loss of an employee's exempt status by refunding any improperly deducted amounts. The regulation in question, known as the "window of correction," states that:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. § 541.118(a)(6) (1991). Despite the fact that the regulation's plain language would allow employees to retain their exempt status as long as they were made whole and the deductions from their pay were inadvertent or for reasons other than lack of work, the court of appeals concluded that this remedial procedure was unavailable to Malcolm Pirnie because it was not compensating the employees in question on a salary basis. The court of appeals reasoned the employees were not salaried because a Malcolm Pirnie policy guide that addressed, in part, proper timekeeping procedures could be read as "allow[ing] proportional salary deductions for *all* em-

ployees . . . who did not complete full eight hour days." *Malcolm Pirnie*, 949 F.2d at 616. Here again, the Second Circuit's decision has potentially devastating implications for contractors. A contractor's policies regarding the recording of hours worked may prevent it from utilizing the "window of correction" and remedying technical errors in a salaried employee's compensation, and consequently all of the contractor's salaried employees may lose their exempt status.

Because of the significance of the Second Circuit's decision for the Government contracting community, NSIA respectfully submits this brief *amicus curiae* and urges the Court to grant Malcolm Pirnie's petition for a writ of certiorari.

ARGUMENT

THE COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE THE CONFLICT AMONG THE FEDERAL COURTS CONCERNING THE INTERPRETATION OF THE SALARY BASIS REGULATIONS

The FLSA requires payment of overtime compensation for hours worked in excess of forty in a workweek. 29 U.S.C. § 207. However, an employer does not have to provide overtime compensation to those employees who are exempt from coverage under the Act.

The exemption most frequently invoked, and the one relevant to this case, exempts from the overtime requirements of the FLSA "any employee employed in a bona fide executive, administrative or professional capacity." 29 U.S.C. § 213(a)(1). For an employer successfully to claim this exemption for a particular employee, the employer must establish that the employee has duties consistent with the status of an "executive, administrative or professional" employee and is paid on a salary basis. Department of Labor regulations specify the conditions under which an employee will be regarded as being paid on a salary basis:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, *which amount is not subject to reduction because of variations in the quality or quantity of work performed.* Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

29 C.F.R. § 541.118(a) (1991) (emphasis added).[3]

A. There Is A Conflict Among The Courts On The Issue Of Whether An Employee's Pay Must Actually Be Reduced Because Of Partial Day Absences Before He Is No Longer Considered Salaried

In *Malcolm Pirnie*, the Second Circuit has concluded that an employee's compensation is "subject to reduction" within the meaning of the relevant regulation whenever his or her employer has a policy or practice that could result in the employee being docked for partial day absences. The Second Circuit is joined in this conclusion by the U.S. Court of Appeals for the Ninth Circuit which held in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 785 (1991), that whether deductions actually have been made from an employee's pay is "irrelevant." *Id.* at 487. The Ninth Circuit reasoned that:

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[3] Subsections (a)(1) through (a)(5) of the regulation discuss the nature of the exceptions to the rule that a salaried "employee must receive his full salary for any week in which he performs any work." Generally, deductions for absences of a day or more are allowed, whereas deductions for partial day absences are not permitted. As indicated, subsection (a)(6) sets forth the procedure for remedying certain improper deductions.

> The dispositive factor is [whether] the employee's pay is at all times "*subject to*" deductions for tardiness or other occurrences. Either pay is fixed and immutable, and not subject to such deductions, or it is contingent. . . . Section 541.118(a) does not require that a deduction for an absence of less than a day *actually* have been made, but only that an employee's pay be "*subject to*" such a deduction.

Id.

However, other federal courts have interpreted the regulation differently. Thus, the U.S. Court of Appeals for the Eleventh Circuit recently dismissed a challenge to the exempt status of certain employees that was based on a city ordinance allegedly requiring a deduction from the compensation of any city employee for tardiness of violations or other work rules. *Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800 (11th Cir. 1991). The court observed that the plaintiff "presented no evidence to prove that any [employee] ever suffered a reduction in pay" as a result of application of the ordinance, and therefore the exempt employees's pay was not actually "subject to reduction because of the quality or quantity of work." *Id.* at 805. Similarly, in *Harris v. District of Columbia*, 709 F. Supp. 238 (D.D.C. 1989), the court held that it could not conclude that the exemption had been lost on the basis of a leave policy that potentially might result in deductions for partial day absences. The court observed that the regulations themselves provide that "[t]he effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case." 29 C.F.R. § 541.118(a)(6) (1991). Consequently, the "implicit rule" of the regulations, when read in their entirety, "is to determine an employee's actual status under the Act based on the facts and circumstances surrounding an unauthorized deduction," rather than on the basis of conjecture about the possible effects of an employer's policies. *Harris*, 709 F. Supp. at 241.

The decisions in *Atlanta Professional Firefighters Union* and *Harris* provide the only reasonable interpretation of the Act and its implementing regulations. Conclusions about the effects of an employer's compensation policies on a salaried employee's partial day absences must remain speculative if the policies have not yet resulted in deductions for partial day absences. Uncertainty about the significance of an employer's compensation policies is compounded when the employer is a contractor that must comply with strict regulatory requirements and policies regarding the recording of employee time actually worked. Directions to employees to note partial day absences on their time records can suggest that employees are "subject to" deductions on account of those absences.

Already one federal court has drawn this improper inference. In *Service Employees International Union, Local 102 v. County of San Diego*, 784 F. Supp. 1503 (S.D. Cal. 1992), the court decided that a group of employees was not salaried, and therefore not exempt from overtime regulations, because they had to comply with certain work rules, including a requirement to record their time. The court observed that:

> Although the County asserts that "no one has testified about punching a 'time clock,'" plaintiffs are required to work set hours, to seek and obtain permission to be away from work during those hours, and to record the time that they work on some form of time sheet or time card. . . . Such rigid attendance and time keeping requirements are not consistent with salaried status.

Id. at 1510.

The holding in *Service Employees International Union* underscores the dangers inherent in the Second Circuit's decision in *Malcolm Pirnie*. If the Second Circuit's decision in *Malcolm Pirnie* is allowed to stand, entire classifications of otherwise exempt employees could lose their

exemption on the basis of a hypothetical deduction that may never be made—with severe consequences for the employer in terms of liability for overtime compensation.

B. There Is A Conflict Among The Courts On The Circumstances Under Which An Employer May Utilize The Window Of Correction To Preserve An Employee's Exempt Status

The Second Circuit refused to recognize Malcolm Pirnie's right to utilize the window of correction to remedy the effects of a very limited number of deductions from the salaries of a few employees.[4] The Second Circuit ruled that the window of correction was not available to Malcolm Pirnie because (1) this remedial procedure may only be utilized with respect to salaried employees and (2) the employees in question were not salaried as Malcolm Pirnie "maintained a policy of docking pay . . . for fractions of the workday . . . missed." *Malcolm Pirnie*, 949 F.2d at 617. The court's conclusion that Malcolm Pirnie maintained such a policy was based on a company manual that addressed, in part, proper timekeeping procedures. *Id.* at 616. In essence, the court of appeals held that an employer must satisfy all the criteria of the salary basis test set forth in the regulation before it can avail itself of a procedure that permits an employer to remedy its failure to meet some of these criteria. For all practical purposes, the Second Circuit has eliminated the window of correction.

Other federal courts disagree with the Second Circuit's strained reading of the regulation. For example, in *Hartman v. Arlington County*, 720 F. Supp. 1227 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990), the court concluded the window of correction was avail-

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[4] There is no dispute that Malcolm Pirnie fulfilled the requirements of the window of correction by reimbursing the employees for any pay that may have been deducted and by revising its procedures to prevent improper deductions in the future.

able to the employer despite the plaintiffs' contention that their pay had been docked pursuant to a policy that resulted in employees being compensated only for hours actually worked if they worked a partial shift. *Id.* at 1229. The court found the employer was entitled to use the window of correction provided it complied with the requirements set forth in the regulation itself. The court noted that pursuant to the express language of 29 C.F.R. § 541.118(a)(6) the overtime exemption is not lost as a result of improper deductions provided "the employer reimburses the employee and promises to comply in the future." *Id.* at 1229-30. The U.S. Court of Appeals for the Fourth Circuit affirmed this decision "on the reasoning of the lower court." *Hartman*, 903 F.2d at 292.

The decision in *Keller v. City of Columbus*, 778 F. Supp. 1480 (S.D. Ind. 1991), is also instructive. Ruling that a written policy that could have resulted in prorated hourly deductions in pay for certain absences did not foreclose use of the window of correction when the city clarified its policy to avoid improper deductions, the court cautioned that it was important not to "lose[] sight of the purpose of 29 C.F.R. § 541.118(a)(6)." *Id.* at 1487. As explained by the court:

> The former policy of hourly deductions allowed by [the written policy] does not go to the pith of the employment relationship; rather, it is simply a trap that may place in jeopardy a salaried status already established. As the regulation's text and previous cases have shown, the "window of correction" applies rather broadly; employers will not be penalized for technical errors that do not go to the substance of the relationship.

Id. The *Hartman* and *Keller* decisions recognize the importance of focusing on the substance of the employment relationship whereas the Second Circuit's decision in *Malcolm Pirnie* elevates form over substance and in the process renders useless the window of correction. Not surprisingly, several other federal courts are in accord

with *Hartman* and *Keller*. *See, e.g., International Ass'n of Firefighters, Alexandria Local 2141 v. City of Alexandria*, 720 F. Supp. 1230, 1232 (E.D. Va. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990); *Sarver v. City of Roanoke*, 29 Wage & Hour Cas. (BNA) 1442, 1444 (W.D. Va. 1989).

The plain language of the regulation reveals the error in the Second Circuit's reasoning. In concluding that an employer's policies must satisfy all the criteria of the salary basis test before the window of correction can be utilized, the court of appeals ignored the regulation's unmistakable distinction between deductions that indicate the employee is not being treated as salaried and deductions that, while arguably improper, are not destructive of the employee's salaried status. Thus, the first two sentences of the window of correction state that:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis.

29 C.F.R. § 541.118(a)(6) (1991). Deductions made for lack of work are evidence that the employee is really an hourly worker; other deductions do not necessarily bear that implication. It is for this reason that the regulation goes on to state that the exemption will not be considered lost if an arguably improper deduction is inadvertent or made for reasons other than lack of work, provided the employer carries out the stipulated remedial procedures.

The plain language of a regulation should control its interpretation. *Oliver v. United States Postal Serv.*, 696 F.2d 1129, 1131 (5th Cir. 1983); *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 1118-19 (10th Cir. 1977). Here, however, the Second Circuit has tortured the plain language of the regulation to yield a result that is inconsistent with the evident intent of the regulation and illogical and impractical as well.

The impracticality of the Second Circuit's interpretation is made manifest by considering its ramifications. No employer will be allowed to correct arguably improper deductions—however few in number—provided there is some sort of policy or procedure, including timekeeping procedures, that could explain the deductions. In other words, the Second Circuit would allow the window of correction to be used only in cases of arithmetic error or, perhaps, cases of mistaken identity. As a result, many employers could be facing millions of dollars in overtime compensation liability even though the amount of improper deductions they may have made from employees' salaries was minuscule.[5]

Concern by state and local government over the vagaries of the courts' interpretations of the salary basis regulations has already prompted the Department of Labor to propose a rule granting regulatory relief to public employers by effectively exempting them from the "no partial day deduction" criterion at issue in the instant case. *See* 56 Fed. Reg. 45,824 (1991) (to be codified at 29 C.F.R. § 541.5d) (proposed Sept. 6, 1991). In justifying the proposed rule, the Department of Labor explained that the salary basis regulations had produced a confusing and contradictory body of case law, adding that:

> These diverging judicial interpretations and accompanying confusion have developed, resulting in the exposure of governmental employers to potentially enormous and generally unexpected back wage liabilities to employees, some of whom would clearly be exempt if duties and amount of compensation alone were examined.

Id. at 45,825.

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[5] Malcolm Pirnie made arguably improper deductions valued at less than $3,300 from a small group of employees. If the Second Circuit's decision is not overturned Malcolm Pirnie would owe approximately $2,000,000 in overtime compensation to nearly 400 employees.

These diverging judicial interpretations and accompanying confusion affect private employers as well, and private employers are similarly exposed to potentially enormous and generally unexpected back pay liabilities. However, the Department of Labor has stated that it will *not* attempt to eliminate this confusion with respect to "private sector pay systems." *Id.* Accordingly, this Court should resolve this important question of federal law which has divided the lower courts.

CONCLUSION

For all the foregoing reasons, NSIA respectfully urges this Court to grant the petition for certiorari.

Respectfully submitted,

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